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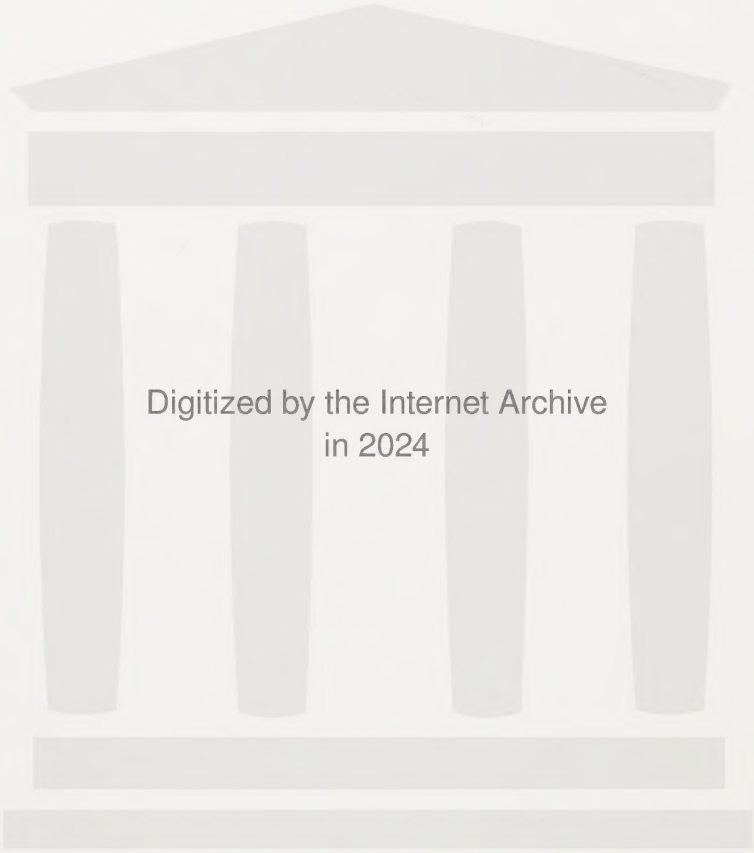
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1895.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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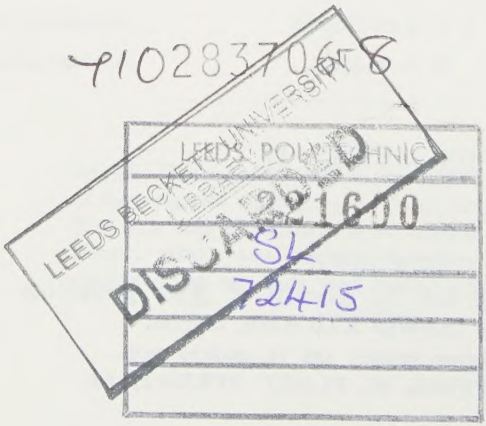
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1895.

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DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1895.

ROBB *v.* GREEN.

1895
Mar. 11, 16, 23;
April 2.

Master and Servant—Implied Obligation of Servant—Improper use of Information obtained during Service—Liability of Servant.

The defendant, being employed by the plaintiff as manager of his business, secretly copied from his master's order-book a list of the names and addresses of the customers with the intention of using it for the purpose of soliciting orders from them after he had left the plaintiff's service and set up a similar business on his own account. Subsequently, his service with the plaintiff having terminated, he did so use the list:—

Held, that it was an implied term of the contract of service that the defendant would not use, to the detriment of the plaintiff, information to which he had access in the course of the service, and therefore that the defendant was liable in damages for any loss caused to the plaintiff by reason of the breach of that term.

ACTION tried before Hawkins J. without a jury.

The following statement of the facts is taken from the judgment of the learned judge:—

This action was brought to recover damages against the

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ROBB v. GREEN.

defendant, who had been in the service of the plaintiff, a tradesman, but who had left him and set up in a similar business on his own account, for improperly soliciting his late master's customers to transfer their custom to himself, and for taking during his service, in breach of his duty and in violation of his contract of service, copies from his master's order-book to facilitate his own solicitations, and using them for that purpose to his master's detriment.

The facts, as I find them to be, are as follows:—

The plaintiff, Robb, was a dealer in live game and eggs. The chief part of his business consisted in procuring the eggs, and in the hatching, rearing, and sale of game birds. For the carrying on of such business he occupied what were called game farms at Liphook in Hampshire, and at Elstead near Godalming. He had carried on that business since the year 1881. At these farms he had been accustomed to keep a large stock of upwards of 5000 laying pheasants, and had sold in one year as many as nearly 150,000 pheasants' eggs. He supplied also live pheasants, as well for shooting as for stock purposes. His customers were numerous, and for the most part were country gentlemen and their keepers, whose residences and estates were spread over England, Scotland, and Wales; and their names and addresses were collected together in his order-book.

In 1890 the plaintiff was desirous of engaging a manager, and, towards the end of July in that year, he had an interview with the defendant at the St. Stephen's Club, when he explained the nature of the business of a game farm, and the care and responsibility it involved; and having informed the defendant that he had works on the premises where he made all his own plant such as pens, coops, &c., he stated that of course he relied on the defendant not to impart any information about the construction of such plant, and above all not to talk about the business done by the farm, and to treat everything in connection with the farm in strict confidence. Nothing, however, was settled on that day. On July 31 the plaintiff wrote to the defendant as follows:—

"I have not yet signed the lease of the farm, but I think

there is no doubt but that I shall continue to hold it as I have done up to now, and for a further term of twenty-one years. I have not yet spoken to my present manager about the proposed change.

"So that all may be quite clear I propose writing the exact terms as I think you understood them, and shall be glad to hear from you whether you feel inclined to accept the post. I also think I made it clear to you where my present manager has failed, and where it is that I feel a want of confidence in his management. These terms were for the first year, or say from the time you took over the management till December 31, 1890, that your remuneration was at the rate of 100*l.* per annum with use of cottage free of rent. Should your management be satisfactory and you feel that you wish to continue, I would give you 100*l.* per annum and a share amounting to 10 per cent. in the profits resulting from your management; i.e., on all profits over and above the profits shewn on the balance-sheet for 1890. The cottage to be then rented at 20*l.* per annum.

"I will wait before speaking to my present manager till I hear from you, when perhaps you will kindly let me know how soon you can arrange to come."

To this the defendant replied on August 2 as follows:—

"I thank you for your letter of the 31st July. I beg to say that I have now had time to reflect on it, and also on what you said last Sunday, and that I am now prepared to accept the post upon the terms stated, with one exception, that I shall receive a minimum salary of 100*l.* per annum irrespective of rent, which I propose for you to deduct out of any commission arising from my share in the business and not from my salary.

"My sister has agreed to come and live with me after a time, and I shall, therefore, be able to get my house furnished.

"I shall be able to come on September 1st, but should you wish me to come at an earlier date, I must arrange to do so.

"I should like to have my money once a month, if not inconvenient to you.

"I assume that the rent of cottage includes all rates and taxes.

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ROBB v. GREEN.

"I took good notice of where your present manager had failed, and I feel perfectly sure that I shall not only be able to master his failings, but that you will find me capable of looking after your interests in every way.

"I might add that the gentleman with whom I am now has offered me a very greatly increased prospective salary if I would stay on with him, but I decline to do so for several reasons.

"N.B.—Kindly let me have an answer by return."

And, on August 6, the plaintiff closed the correspondence, so far as related to the contract, by a letter to defendant of that date:—

"I duly received your letter. I am sorry I did not make it clear in my last that I did not propose deducting the 20*l.* for the cottage from your salary of 100*l.* It would, therefore, come off the increase in your salary arising from any increased profits, thus assuring you a minimum of 100*l.* per annum. I have now told my manager, and am this week advertising for a situation for him; I have told him he can keep the cottage till Michaelmas, if he can't get suited sooner, but I shall be quite ready for you early in September. Would Monday, September 1st, suit you? On hearing from you, I will arrange to get a room for you at the Inn near my place."

The defendant was accordingly engaged, and in September, 1890, entered the plaintiff's service as his manager.

The defendant in his evidence stated that the only terms agreed on were those contained in the three letters I have referred to, and that nothing was said as to the names of the plaintiff's customers, nor about keeping their names secret or confidential. I accept, however, the plaintiff's version of the conversation, if it be material. Nothing further touching the matters now in question occurred until the month of August, 1893. In the meantime the defendant had acted as manager of the plaintiff's business, and as such had access to his books, and, among them, to the order-book above referred to. That the plaintiff reposed great confidence in him until the discovery of the misconduct complained of is very certain. This the defendant acknowledged in a letter of August 22, 1893.

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On November 22, 1893, the defendant gave to the plaintiff notice that, at the end of that year, he should consider the agreement between them at an end, and that notice was duly accepted; and so with the year 1893 terminated the service of the defendant with the plaintiff.

In March, 1894, it came to the knowledge of the plaintiff that the defendant was carrying on a similar business to his own at what the defendant described as "The Game Farm, Henley." An advertisement of it appeared in the *Field* of March 3, 1894. When that game farm was first established does not very clearly appear; but, if the defendant's announcement upon a pictorial price list is to be accepted, it was in the year 1893, although according to the defendant's account it was not until February 19, 1894, that he entered into the agreement under which he obtained possession of it. The possession of the farm was speedily followed by two circulars (undated), addressed respectively, one to a great number of the plaintiff's customers whose names and addresses are comprised in the order-book, and the other to gamekeepers whose names and addresses were also in the order-book, but who had sent their orders without giving the names of their masters. The names and addresses in the order-book had been copied from that book into a list by the defendant, whilst in the service of the plaintiff, clandestinely, without his master's knowledge or authority, and for the purpose of using it to solicit his master's customers to give their custom to him.

The circular to the customers was as follows:—

"The Game Farm,
Henley.

"Sir,—I have the honour to inform you that after several years' experience as manager of the Liphook Game Farm, I have purchased and taken over this well-established business. I enclose my list of quotations for the coming season in the hope that my terms being so reasonable you will extend the favour of your orders to me. My knowledge of the business being extensive you can rely on my adopting every modern improvement to obtain the best results. I am now using Portable Pens for the Pheasants during the laying season, and by a constant change

1895

ROBB v. GREEN.

of pasture I hope to greatly improve the healthy generating power of the eggs.

"Awaiting the favour of your commands,

"I beg to remain," &c.

To the keepers the circular, giving the same address, ran thus, the language being altered to suit the intelligence of the person to whom it was addressed:—

"The Game Farm,
Henley.

"Sir,—I have the pleasure to inform you that after several years' experience as manager of the Liphook Game Farm I have purchased and taken over this well-established business.

"I enclose my list of quotations for the coming season in the hope that my terms being so reasonable you will see the way to advise your master to extend his orders to me. My knowledge of the business being extensive you can rely on my adopting every modern improvement to get the best results. I am now using portable pens for the pheasants during the laying season, and by a constant change of pasture I hope to greatly reduce the ailments of chicks.

"Awaiting the favour of orders from your estate,

"I remain," &c.

"P.S.—I allow a bonus of 7½ per cent. to head keepers on the value of their orders."

The fact that these circulars had been issued, together with the fact that the defendant had taken copies of the names and addresses of his customers, came to the knowledge of the plaintiff about ten days after seeing the *Field* advertisement of March 3, and he thereupon instructed his solicitors to take proceedings against the defendant; and accordingly the writ in this action was issued on March 14, 1894, indorsed with a claim for damages for having wrongfully taken and made use of such copies and for wrongfully issuing the circulars. The actionable character of these complaints I have to deal with hereafter; and I only introduce the issue of the writ with its indorsement here for the purpose of pointing out the answer the defendant instructed his solicitor to make to the action in this early stage of

it. That answer is contained in the letter of the defendant's solicitor to the plaintiff's solicitors of March 20, 1894, and is to the following effect:—

"*Robb* v. *Green.*

"The defendant has consulted me in reference to the writ issued by you in this matter, and has shewn me the circular of which your client complains. I do not think the circular bears the construction your client is desirous to place on it as being calculated to induce people to the belief that defendant had taken over his business. Notwithstanding my view as to this, I have suggested (in order to avoid litigation) to my client that he should send out a fresh circular distinctly referring to the fact that his circular refers to the 'Game Farm, Henley,' and not to the 'Game Farm, Liphook,' which is still carried on by your client.

"He states there is no truth in the statement that he has been representing that he is a partner with the plaintiff, and denies that he has taken any copy or extract from your client's books, or the names and addresses of his customers, or otherwise.

"I do not think your client can have any reason of complaint because of the fact of some of the circulars having been sent to persons who happened to have been customers of your client.

"I will forward a copy of the fresh circular my client will issue to you as soon as I receive it from him."

I have already stated that on November 22, 1893, the defendant gave notice to terminate his service with the plaintiff on the last day of that year.

On the 30th of that same month, while in the plaintiff's service, Mr. Barclay met the defendant at the Grosvenor Hotel. The defendant there mentioned that he was then in the service of the Liphook Game Farm, but that he was at liberty to leave at any moment. Mr. Barclay then talked with him as to a proposed partnership between himself and a Dr. Baines in the same business at Henley, and suggested that, if that were carried out, the defendant should become manager at a salary, and that it should be matter for further consideration whether he should have a percentage or a share in the partnership. It was further

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suggested that the defendant would not be expected to put any capital into the business; but the defendant led Mr. Barclay to believe that as against his capital the defendant would bring in a considerable amount of business, and that he had a considerable number of good names as customers he would introduce. I have no doubt this had reference to the copies from the order-book; and substantially, it was offering to bring in capital dishonestly obtained. The proposed partnership between Mr. Barclay and Dr. Baines, however, fell through, but that is immaterial.

The defendant himself deposed to having been in negotiation with Dr. Baines two or three months before.

The proof of defendant's having so copied the order-book was derived from his own answers to interrogatories. The evidence of Mr. Barclay shews that he looked upon the copy as a valuable piece of property. The list so copied was produced. The defendant admitted it was written by him when nobody saw him, that his object was to use the names, and he confessed that he had regarded what he did as unfair and dishonourable, and that probably his master would have turned him away had he known of his misconduct; but that he did not think his employment was confidential, or that he was bound to protect his master's interests, as it was not expressly so said.

Murphy, Q.C., and *R. M. Bray*, for the plaintiff.

McCall, Q.C., and *Pollard*, for the defendant.

The authorities relied on are fully discussed in the judgment.

Cur. adv. vult.

April 2. HAWKINS J. (after stating the facts as set forth above). I dispose at once of that part of the plaintiff's complaint, both as indorsed on the writ and contained in the statement of claim, which charges that the circulars were calculated to induce the persons to whom they were addressed to believe, contrary to the fact, that the defendant had taken over the plaintiff's business, and thus clear the way for the more important question which arises upon the residue of the complaint.

As regards the circulars, then, I am of opinion that the language of them was not calculated to produce the erroneous

impression suggested. They commence, as they fairly might, by stating the extent of the writer's experience, and the paragraph which immediately follows, "I have purchased and taken over this well-established business," clearly to my mind could only reasonably be read as having reference to "The Game Farm, Henley," from which the circular is addressed. No authority was cited to me, and I know of none, which would support a different view. The circular in *Helmore* v. *Smith* (No. 2) (1) was very different. Whether there was a latent hope that it might possibly produce such an effect (as it seems to have done upon two witnesses who were called), I do not stop to inquire.

The residue of the plaintiff's complaint is of a far more serious and important character. It amounts in substance to this—that, during defendant's service with the plaintiff, he was guilty of a gross breach of confidence with the deliberate object already mentioned, and that, after his service was terminated, he carried out that object with the materials he had so dishonestly obtained to his own advantage and his late master's detriment.

The question raised upon this point of the case is the more important because the learned counsel for the defendant have insisted that in all he did the defendant was justified in law.

The case against the defendant on the pleadings was treated as a breach of the contract of service between the defendant and the plaintiff, and that contract is stated in the first and second paragraphs of the statement of claim in these terms: "that the defendant entered the service of the plaintiff and undertook the duties of assisting the plaintiff in the management of his business upon the terms, amongst others, that, having access in the course of his employment to the books of the business and to the correspondence with the customers, all information obtained by him in relation to the plaintiff's business and his customers, or contained in his books or correspondence, should be treated by him as strictly confidential, and should not be made use of by him for any purpose other than the purpose of the business." The breach of that contract is stated in the fourth paragraph, which alleges that, before leaving the plaintiff's service, the defendant, without the plaintiff's authority, took copies of or

(1) 35 Ch. D. 449.

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extracts from the plaintiff's books, and, in particular, made a list of the names and addresses of the plaintiff's customers and of their keepers with the intention of using the same for his own benefit and against the interest of the plaintiff.

Whatever, if any, amendments or additions to the pleadings are necessary in order to dispose of this case upon its merits, I allow them. It was urged by the defendant's counsel that there was no such contract as alleged, and that no amendment could usefully be made; and he based his contention upon these grounds: First, that the whole contract was in writing, and contained in the three letters of July 31 and August 2 and 6, 1890, and that by that contract and that only was the defendant bound; secondly, that the conversation spoken to by the plaintiff as having taken place before those letters were written, and which I find did take place, could not be imported into the contract; lastly, that no implied contract could be held to attach to the written one.

I think neither of these contentions can be supported. As to the first, I look upon the expression so much relied on, "the exact terms," to be found in the second page of the letter of July 31, as having reference only to the terms of remuneration to be paid to the defendant for his services. As to those terms I think the letters are conclusive. As to the second contention, I am satisfied that both parties intended that those requirements, which were specially dwelt upon in the course of the conversation, should be observed by the defendant as conditions of his service, and that neither of them supposed or intended the letters alone to contain every term of their contract. It would be absurd to suppose that the plaintiff ever intended to forego those requirements of honesty, fidelity, &c. As to the third contention, I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely, that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to

matters confided to him in the course of his service. It would be monstrous to suppose that a servant would be absolved from the observance of these essential elements to good service, unless they were in terms specially provided for in the contract.

Against the view that the law would imply, or that a jury or judge could infer, such a promise, Mr. McCall could not—at least he did not—cite any case other than *Thorn* v. *Mayor of London*. (1) I have carefully read that case, but I cannot realise its applicability to that before me. There it was sought to introduce an implied term into a contract to execute works in the building of Blackfriars Bridge with a view to qualify an express provision in the contract by which the plaintiff had bound himself. A mere glance at that case will shew that it cannot be made applicable to the case before me. As an authority in support of my own view, I would refer to the case of *Morgan* v. *Ravey*. (2) Pollock C.B., in delivering the considered judgment of the Court of Exchequer, said: "We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him." Applying that principle, I think the law will imply, and I, sitting as a jury, ought to and do infer, such a promise in the present case: see also judgment of Bowen L.J. in *Helmore* v. *Smith*. (3) It will be observed that the Court did not, in the case I have just cited, limit the applicability of its judgment to cases between master and servant, but extended it to all cases where a relation exists between two parties involving the performance of duties by one of them for consideration from the other. It certainly applies to all cases between employer and employed. In *Tuck & Sons* v. *Priester* (4) the plaintiffs, art publishers in England, sent to the defendant, a printer in Berlin, a water-colour drawing, with a written order to make 2000 copies with a view to their sale. The order was executed; but the defendant, without the knowledge or consent of the plaintiff, made a number of other copies

(1) 1 App. Cas. 120.
(2) 6 H. & N. 265, 276.
(3) 35 Ch. D. 449, 456.
(4) 19 Q. B. D. 629.

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for himself, with a view to sell them on his own account. The plaintiffs insisted that in accepting the order the defendant impliedly contracted not to make copies for himself. Lord Esher, in delivering his judgment, said: "The contract being a written one, it must be construed by the writing alone, and the plain, honest meaning of it was this: 'You are to make those copies for us, and then you are to return the picture to us, and you are not to make any other copies for your own benefit.' That term was implied as plainly as anything could be." In the same case, Lindley L.J. said that the employment of the plaintiff "carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiff to an injunction."

I am aware that, in *Pearson* v. *Pearson* (1884) (1), Cotton L.J. made use of these words: "I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation." That observation, however, was applied to a contract for sale of a goodwill, and has no application to a bare contract of service like that in the present case. To the same effect as *Tuck* v. *Priester* (2) is *Pollard* v. *Photographic Company* (1888) (3), the case of photographers who sold negative copies of the photograph likeness of their customers, in which North J. said: "Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use." In the course of his judgment, North J. states as a well-known fact that "a student may not publish a lecture to which he has been admitted, even though by his own skill he has taken a copy of it in shorthand."

Great stress was laid by the learned counsel for the defendant upon the fact that a servant having left his master may, unless

(1) 27 Ch. D. 145, 155. (2) 19 Q. B. D. 629.
(3) 40 Ch. D. 345.

restrained by contract, lawfully set up in the same line of business as his late master, and in the same locality; and that he may, without fear of legal consequences, canvass for the custom of his late master's customers, whose names and addresses he has learned, bonâ fide accidentally, during the period of his service. I do not suppose that anybody, with any knowledge of the law, would seriously contend to the contrary. Such a course has been recognised as legal by authority: see per Bowen L.J. in *Helmore* v. *Smith* (1), and per North J. in *Irish* v. *Irish*. (2) But the counsel for the defendant go further, and contend that he may canvass his master's customers whilst he remains in his service, and even whilst he is engaged in the discharge of his duty to his master with those very customers; and further still, that he may read his master's business books with a view to learn his customers' names and addresses, and may carry these things away in his head, if his memory will enable him, and that he may write them down at his own residence. Having gone thus far, they are compelled, in order to justify the conduct of the defendant, to contend that a servant might in his master's service, having confidential access to his master's books for the purposes of his business, copy, as in this case, the names and addresses of his master's customers with a view to use them to facilitate his canvass for their custom, as soon as he should see fit after the termination of his service; in short, to canvass with the aid of stolen material, without which, having regard to the wide extent over which the customers were spread, practically he could not canvass at all. I confess this seems to me a startling proposition, and to it I do not assent. The case of *Nichol* v. *Martyn* (1799) (3) was strongly relied upon by the defendant's counsel. That case was tried before Lord Kenyon. It is only reported as a nisi prius decision in Espinasse. It was an action brought by the plaintiffs against the defendant, who had been a traveller of theirs but was about to leave their service, for seducing their customers, whilst engaged on their business, by canvassing such customers for orders on his own account when he set up in business, as he was about to do after leaving the

(1) 35 Ch. D. 449.
(2) 40 Ch. D. 49.
(3) 2 Esp. 732.

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plaintiffs at Christmas then next. The plaintiffs were nonsuited, Lord Kenyon saying: "The conduct of the defendant in this case may perhaps be accounted not handsome; but I cannot say that it is contrary to law. The relation in which he stood to the plaintiffs, as their servant, imposed on him a duty which is called of imperfect obligation, but not such as can enable the plaintiffs to maintain an action. A servant, while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is *damnum absque injuria*. There is nothing morally bad, or very improper, in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them, so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers; on the contrary, he took for the plaintiffs all those he could obtain; his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end." It seems presumptuous to criticise or doubt so high an authority, but I cannot help asking myself whether at the present day Lord Kenyon, after considering the matter, would have considered it no breach of the duty of a servant deliberately to utilize his hours of service by being false to his master's interests and endeavouring to induce his master's customers to transfer their custom to him on a near approaching day. It was certainly against his master's interests that he should do so. It may be under particular circumstances that the injury done to his master would hardly be greater than if he had waited till he had left the service before he made his canvass. But that is not the question. The obligation to protect his master's interests lasts until the last hour of his service. The dividing line between owing his master a duty and owing him none is that imperceptible period of time between the termination of his service and the moment he acquires freedom of action after his service has terminated. Here we are dealing with a flagrant breach of trust during service

with intent to reap the advantage contemplated afterwards. In such a case, too, it seems to me that the fraud in service with intent to use afterwards and the use afterwards are both discountenanced by law. The breach of confidence in service can hardly be said to be a duty of imperfect obligation, for, as I have pointed out upon authority, the law will imply a promise to perform it; and the utilization of the fraud cannot be legalized by the fact that, though that utilization was contemplated when the fraud was committed, the relation of master and servant had terminated before it was carried out. So to hold would be a great encouragement to fraud. In what I have said I do not intend to convey that while the contract of service exists a person intending to enter into business for himself may not do anything by way of preparation, provided only that he does not, when serving his master, fraudulently undermine him by breaking the confidence reposed in him. For instance, he may legitimately canvass, issue his circulars, have his place of business in readiness, hire his servants, &c. Each case must depend on its own circumstances.

In *Irish* v. *Irish* (1) North J. points out that a manager of a business may, after the termination of his service, lawfully canvass the customers in a manner which during the continuance of it would have been inconsistent with his employment; but he does not go on to say that he may designedly prepare the way for soliciting the customers of his master by breaches of confidence during his service.

In 1843 was decided the case of *Tipping* v. *Clarke*. (2) It was a suit for an injunction to restrain the defendant, who had in his dealings with plaintiff acquired knowledge of matters in the plaintiff's books, relating not only to his, the defendant's, accounts, but also to the accounts of others of the plaintiff's customers, which the defendant had threatened to publish, from carrying out his threat. The case is valuable only for this passage in the judgment of Wigram V.C.: "Looking at the case with reference to contract, I cannot say that the defendant shall not make known to the world his own dealings with another party, but it is clear that every clerk employed in a merchant's

(1) 40 Ch. D. 49 (2) 2 Hare, 383.

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counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. If the defendant has obtained copies of books, it would very probably be by means of some clerk or agent of the plaintiff's; and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract." These observations were cited with approval by Lord Cottenham L.C. in *Prince Albert* v. *Strange* (1) and by Turner V.C. in *Morison* v. *Moat* (1851). (2) In *Helmore* v. *Smith* (3) one Henry William Helmore had been in the service of Helmore & Smith, coal merchants, as a clerk, and while in such service a list of the names of the customers of the firm had been entrusted to him to be used for the purposes of their business. This list he had kept when he left their employment, contemplating setting up in a similar business on his own account. The character of his action came in question, though it did not form the ground of the judgment, but the opinions expressed by the Lords Justices are valuable. Cotton L.J. observed that it must not be supposed that he did not strongly disapprove of such conduct, and that it was dishonourable. Bowen L.J., in dealing with the question of a servant's competing for his master's business when free from his service, said that if the acts complained of merely amounted to such fair competition as the business would have been liable to experience in ordinary course, they would be unobjectionable. He then proceeds to shew that the acts proved did not amount to such fair competition. "The appellant (H. W. Helmore) had been in the employment of this firm. He then became, in the course of his employment, entrusted with certain information, namely, the names of the customers of the firm, which was reduced to a list for the purpose of collection. This list he carried away with him as if it had been his own property." The information was the property of his employers; the mere property in the paper is nothing. Then, stating that the decision did not turn on that act, he added, "but as it has been suggested to the

(1) 1 McN. & G. 35, 45. (2) 9 Hare, 241, 258.
(3) 35 Ch. D. 449.

Court that this act was justifiable, I think it right to say, lest it should be thought that the judges countenanced such acts, that it must not be assumed that such conduct was honest or legal; nor could I sit by and allow it to go forth to the world that I countenance the doctrine that the confidential information received by a servant to advance his master's business may be used afterwards by him to advance his own business to the injury of his master's interests. It is part of the implied contract between the master and the servant that such confidential information is not to be used to the master's disadvantage." I would ask, would it improve the servant's position if, instead of his receiving information from his master, he availed himself of the opportunity afforded him by the confidential character of his position, and stole the information? Does that give him a better title to use it against his master? In *Lamb* v. *Evans* (1) the defendants had been canvassers of the plaintiff for advertisements to be inserted in a classified trade directory published by the plaintiff. At the expiration of their service they proposed to assist a rival publication in procuring similar advertisements and to use for such rival publication the materials they had obtained for the plaintiff while in his service. The action was brought for an injunction. Lindley L.J. says (at p. 226): "What right has any agent to use materials obtained by him in the course of his employment and for his employer against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal." Bowen L.J., in his judgment (at p. 229), asks: "Has not the plaintiff a right to restrain the defendants from using such blocks and materials or copies as they obtained while they were in the employment of the plaintiff and for the purposes of their service and of the work which they had to do, that is to say, which they obtained for the purpose of doing their duty to the plaintiff? . . . That depends entirely, I think, upon the terms upon which the employment was constituted through which the fiduciary relation of principal and agent

(1) [1893] 1 Ch. 218.

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came into existence." And, after stating that there is no distinction between law and equity as regards the law of principal and agent, he says: "The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile." The rest of his judgment, though very valuable and instructive, is too long to be cited at length. It discusses, however, without approval *Reuter's Telegram Co.* v. *Byron* (1) before Jessel M.R. The judgment of Kay L.J. is to the same effect.

There is one other contention of the defendant's counsel I must refer to. He contends that the order-book of the plaintiff contained no more information than might be acquired by reference to directories and such-like publications; and, moreover, he says that the defendant's master, in seeking to advance his own business, before the defendant made the copy of the order-book, had published circulars or pamphlets containing the names of many of the customers who had sent him favourable testimonials; so that the defendant had when he made the list complained of materials at his command without making use of his master's book. This to a considerable extent may be true, but it is not so altogether. The order-book contains collected together the names and addresses of purchasers of pheasants' eggs spread over the length and breadth of England, Wales, and Scotland. No directory would give this information in this collocation; and though, of course, the testimonials would give similar information as to many of the names in the order-book, there are many names in the order-book which do not appear among the testimonials. The names of all the customers are collected together in the order-book in a manner not to be found in any other book or paper to which the defendant had access. To him, therefore, the possession of a copy of the order-book would be

(1) 43 L. J. (Ch.) 661.

peculiarly valuable. He would be saved the expense and delay of searches, such as would be necessary to enable him to compile such a list for himself. Practically, to bring all those names together, even though singly each may appear in some directory or other, would be almost impossible; and it would obviously be much more difficult to ascertain whether they would be likely customers for pheasants' eggs. By making a copy of the order-book defendant was able to canvass at once each of his master's customers without trouble or expense; and the conversation with Mr. Barclay shews that he looked upon the list in that light. The collection together of these names and addresses in his order-book was the property of the plaintiff. It is the compilation which made the book and the list so valuable to the defendant, and facilitated his endeavours to entice his master's customers to the detriment of the latter. In this respect there is a strong analogy between this case and *Lamb* v. *Evans* (1), already cited, and the case of *Merryweather* v. *Moore* (2), which also supports the opinion I have expressed. Possibly the taking his master's book and using its contents as he did might be treated as a tortious act; but, however this may be, I have no doubt it was a gross breach of his duty and of his obligation to his master, for which the plaintiff is entitled to maintain this action. The effect of this judgment will not be to check fair and honourable competition, nor to restrain a servant while in the employ of a master so to conduct himself as fairly to ingratiate himself with, and obtain the good opinion of, every customer who may come to his master's shop or other place of business; and if, after his service is over and when he is about to set up in business for himself, he is minded to canvass those customers to give him their custom, or a part of it, he will be perfectly justified in so doing. But I hope it will have the effect of deterring every clerk or servant while in service from betraying his master's confidence and knowingly taking dishonourable advantage of information which, as a servant, he obtains to advance his own interests at the expense of his employer.

As to damages, I have thought anxiously over this question. It is impossible with mathematical accuracy to ascertain them.

(1) [1893] 1 Ch. 218. (2) [1892] 2 Ch. 518.

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It would be unjust to saddle the defendant with every loss of custom the plaintiff has sustained, for that cannot all be reasonably attributed to the unlawful action of the defendant. The specific instances as yet traced to the defendant's action are, it is true, but few; but still their loss does not form the limit of the injury to the plaintiff, for the wholesale canvass of his customers was likely to influence many and to diminish permanently his receipts and profits. On the other hand, fluctuation of business, bad times, and many other circumstances may possibly have contributed to the loss. I cannot, therefore, award the plaintiff an indemnity against the whole diminution of his trade. After the best consideration I have been able to give the matter, I think judgment should be entered for the plaintiff for 150*l.* and for an injunction as prayed, namely, that the defendant may be ordered to deliver up to the plaintiff to be destroyed the list of the names and addresses of the plaintiff's customers and their keepers copied or extracted by the defendant from the plaintiff's books, and all copies or extracts of or from such list now in his possession or under his control: and that the defendant be restrained from making use of the information obtained by him by copying or extracting such names and addresses, with costs.

Judgment for the plaintiff for 150*l. damages and for an injunction, with costs.*

Solicitors for plaintiff: *Roopers & Whately.*
Solicitors for defendant: *Church, Rendell & Todd.*

W. A.

[IN THE COURT OF APPEAL.]

C. A. 1895 *April* 4.

FLOOD AND ANOTHER *v.* JACKSON AND OTHERS.

Action, Cause of — Maliciously inducing Employer to discharge Servant — Maliciously inducing a Person to abstain from employing another — Liability to Action although no Breach of Contract involved — Liability of Members of Trade Union for acts of District Delegate.

An action will lie against a person who maliciously induces a master to discharge a servant from his employment if injury ensues thereby to the servant, though the discharge by the master does not constitute a breach of the contract of employment. An action will also lie for maliciously inducing a person to abstain from entering into a contract to employ another, if injury ensues thereby to that other.

The plaintiffs were shipwrights, employed by the day by a firm of ship-repairers to execute repairs to the woodwork of a ship. Some ironworkers who were members of a trade union were employed on the ironwork of the ship, and they objected to working in the same yard with the plaintiffs upon the ground that the latter had previously worked at ironwork on ships in another yard. The district delegate of the union was called in by the ironworkers, and he informed the employers that the ironworkers would leave off work unless the plaintiffs were discharged that day. In consequence of that threat the plaintiffs were discharged at the end of the day. The plaintiffs brought an action against the district delegate, the chairman, and the general secretary of the union, for maliciously, and with intent to injure the plaintiffs, inducing the employers to discharge the plaintiffs and to refuse to engage them again. The jury found that the district delegate acted maliciously, and that the plaintiffs had been injured thereby, but that the other two defendants did not authorize his acts:—

Held, that the action was maintainable against the district delegate, although the discharge of the plaintiffs, and the refusal to re-engage them, involved no breach of contract on the part of the employers:

Held, also, that the district delegate was not the agent or servant of the members of the union, so as to render each member liable for his acts, and that, therefore, the chairman and general secretary were not, merely by reason of their being members of the union, liable in the action.

ACTION by the plaintiffs against the defendants for maliciously and wrongfully, and with intent to injure the plaintiffs, procuring and inducing the Glengall Iron Company to discharge

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them from their employment, and not to engage or employ them again. (1)

The action was tried before Kennedy J., with a jury, when the following facts appeared: The plaintiffs were shipwrights and ship-repairers, and the defendants, Jackson, Knight, and Allen, were members of a trade union called the United Society of Boilermakers and Iron Shipbuilders, whose head office was at Newcastle-upon-Tyne, Jackson and Knight being respectively the chairman and general secretary of the union, and Allen the district delegate for London. In April, 1894, the plaintiffs and certain ironworkers, the latter being members of the above-mentioned trade union, were employed by the Glengall Iron Company, a firm of ship-repairers and dry dock proprietors, to execute certain repairs to a steamship at the Glengall Company's dock, Millwall, the plaintiffs being employed on the repairs to the woodwork and the ironworkers on the repairs to the iron-work of this ship. The plaintiffs were employed by the day, and could be discharged without previous notice at the end of any day. Soon after the repairs to the ship were commenced the ironworkers held a meeting and resolved that they would not work in the same yard with the plaintiffs, and that they would leave the work unless the plaintiffs were removed, alleging as their ground of complaint that the plaintiffs had worked at iron-work on ships at Messrs. Mills & Knight's dock at Rotherhithe in the earlier part of the year, and they thereupon communicated with the defendant Allen, the district delegate. Allen came, and was told by one of the ironworkers that the men objected to the plaintiffs working there, and would leave the work unless the plaintiffs were removed; and he then told the men not to leave the work without the sanction of the executive council, and that if they did they would lose the benefits of the union, and that he would try to settle the matter. Allen then had an interview with the manager of the Glengall Iron Company, at which he told the manager (according to the evidence of the plaintiffs' witnesses) that the ironworkers had determined not to work in

(1) There was also a claim against the defendants for conspiring to do the above-mentioned acts; but this is omitted, as Kennedy J. held that there was no evidence in support of it.

the yard with the plaintiffs, as the latter were known to have done ironwork in Messrs. Mills & Knight's dock, and that unless the plaintiffs were discharged from their employment that day all the ironworkers in the society would leave off work, and that the ironworkers would leave off work in any other yard in which the plaintiffs were employed, adding that they were doing their best to stop the practice of shipwrights being employed on ironwork. There was also evidence that Allen did this to punish the plaintiffs for their previous conduct in working upon iron. The manager, in consequence of this, in order to prevent a strike, discharged the plaintiffs at the end of the day, and refused to employ them again in the yard. The evidence shewed that the defendants, Jackson and Knight, both of whom resided at Newcastle, did not know of the dispute at the Glengall Iron Company's dock, nor did Allen report to or consult them or any other officer of the society upon the dispute, and that the first time they heard of it was when the writ in this action was served.

By the rules of the United Society of Boilermakers and Iron Shipbuilders the society was governed by an executive council elected from the branches in the district where the head office was situated, and the executive council elected a chairman from among their number. The general secretary, who was bound to be a member of the society, was elected by the members, and his duty was to transact the society's business in such manner as the executive council should direct; but he was not a member of the executive council. Upon the application of three-fourths of the branches composing any district, the society might elect a district delegate, who should be under the supervision of the district committee, the district committee and the district delegate being both under the control of the executive council. By rule 33, s. 1, should a dispute arise in any shop or yard, the members of that shop or yard were to make it known to the nearest branch, and the officers of such branch should try and settle such dispute; but should a dispute arise in any shop or yard which could not be amicably settled by the branch or district committee, it should be referred to the executive council, who would give them instructions on the subject. The rule

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further provided that under no circumstances would members be entitled to the benefit of this section, involving among other things receipt of strike pay, unless the dispute was first sanctioned by the executive council. There were no rules of the society regulating the conduct of a district delegate in the case of a dispute; but the defendant Allen in his evidence said that in minor cases the executive council left things to his discretion, and that in cases of minor disputes he did not refer to his committee, and that he considered this a minor case.

The following were the questions left to the jury: (1.) Did the defendant Allen maliciously induce the Glengall Iron Company to discharge the plaintiffs or either of them from their employment? Answer, Yes. (2.) Did the defendant Allen maliciously induce the Glengall Iron Company not to engage the plaintiffs or either of them? Answer, Yes. (3.) Did both or either and which of the defendants Jackson and Knight authorize the defendant Allen in acting as he did? Answer, No. (4.) Was the settlement of this dispute a matter within the discretion of Allen? Answer, Yes. The jury found that the plaintiffs had suffered damage to the extent of 20*l.* each, and assessed the damage accordingly. Upon the findings of the jury the case was reserved for further consideration and argued by

J. Lawson Walton, Q.C., and *Rufus Isaacs*, for the plaintiffs;

Robson, Q.C., and *E. Morten*, for the defendant Allen; and

Murphy, Q.C., and *L. G. Pike*, for the defendants Jackson and Knight.

Cur. adv. vult.

1895. March 5. KENNEDY J. read the following judgment:— In this case the jury have found that the defendant Allen maliciously induced the Glengall Iron Company to discharge the plaintiffs from their employment, and also maliciously induced the same company not to engage the plaintiffs. The jury have also found that the plaintiffs have suffered pecuniary damage by these malicious acts. It is, I think, convenient to consider the questions which arise upon these findings before considering the other findings of the jury which affect the two other defendants, Jackson and Knight.

Two things were expressly decided by the judgment of the Court of Appeal in *Temperton* v. *Russell* (1), given in point of date after the judgment of the House of Lords in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2), and especially important in its bearing upon the present case, not only as the most recent authority in the Court of Appeal upon this class of question, but also as being a judgment upon a state of facts which in several material particulars closely resembled the present. The two points decided were :—

(1.) That if A. maliciously procures B. to break his contract with C., and C. is injured thereby, he has a good cause of action against A.

(2.) That if A. and B. maliciously conspire to injure C. by inducing persons not to enter into contracts with C., and C. is injured thereby, he has a good cause of action against A. and B.

The same case, also, has given me, in the judgments of the Master of the Rolls and the Lords Justices, authoritative guidance as to what constitutes malice in cases of this kind. It is not necessary that the defendant should be actuated by spite or malice against the injured party personally in the sense that the defendant's motive was the desire to injure him ; but it is sufficient if the defendant's desire was to injure him in his business in order to force him not to do what he had a perfect right to do. This is so stated in terms, pp. 725, 726, by Lord Esher M.R., who at p. 728 quotes the judgment of Lord Selborne and himself in the case of *Bowen* v. *Hall* (3) : "If the persuasion" (to break a contract with the plaintiff) "be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." Lopes L.J. says of *Bowen* v. *Hall* (3) that he understands it "to lay down the broad principle that a person who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong." A. L. Smith L.J. expressly approves of the direction of Collins J.

(1) [1893] 1 Q. B. 715. (2) [1892] A. C. 25.
(3) 6 Q. B. D. 333.

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to the jury, which, so far as it is necessary to quote it, was "that to induce a person who has made a contract with another to break that contract, in order to hurt the person with whom it has been made, to hamper him in his trade, or to put undue pressure upon him, or to procure some indirect advantage for the person himself, is in point of law to do it maliciously." (1)

I agree with the counsel for the defendant that in so far as the decision in *Temperton* v. *Russell* (2) is a decision upon the case of conspiracy, which formed one of the two branches of the plaintiff's claim in that action, it cannot properly be treated as an authority against the defendants here. There is no finding—and upon the evidence there could be no finding—of conspiracy in the present case.

With regard to the other branch of the case of *Temperton* v. *Russell* (2), the decision of the Court of Appeal that the malicious inducement of a breach of contract gives a good cause of action to the party injured thereby is plainly not a decision upon exactly the same facts as exist in the present case, because in the present case the malicious inducement of the defendant Allen to the Glengall Iron Company, to discharge the plaintiffs and not to employ them again, operated without involving any breach of contract between that company and the plaintiffs; and I observe that in his judgment in *Temperton* v. *Russell* (2) A. L. Smith L.J., at p. 733, expressly reserved for decision hereafter the question whether this cause of action will apply if there is no contract in existence.

I have now to consider the question thus reserved by the Lord Justice, and it appears to me that the answer depends upon this: Is there any principle of law upon which, if a person is injured by the malicious inducement of his discharge from his employer's service or by the malicious inducement of a refusal to employ him, that person's right to a remedy in damages against the malicious inducer can be held to depend upon the injury being accompanied by or inflicted through a breach of contract between him and the party so induced?

After giving this question my best consideration, I cannot

(1) *Temperton* v. *Russell*, [1893] 1 Q. B. 715, at p. 732.
(2) [1893] 1 Q. B. 715.

think that there is any such principle; and I am greatly fortified in this conclusion by the language of Lord Esher M.R. in *Temperton* v. *Russell*. (1) "The next point," he says, "is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable." Where there is an existing contract which is broken by reason of the inducement the damages may be more easily and satisfactorily ascertainable. There is this degree of difference between the cases; but as regards the legal position of the injured party in the two cases I can find no sound basis of distinction. It is urged here on behalf of the defendants that what Allen did—even if, as the plaintiffs' witnesses deposed, he persuaded the company to discharge the plaintiffs, and not again to employ them, by the threat of calling out all the ironworkers in the company's yard—was a lawful act, and the judgment of the Court in *Curran* v. *Treleaven* (2) was referred to—a case, I may point out in passing, in which the question was not of an actionable wrong, but of a criminal offence, and which may therefore be affected by very different considerations. In my view, the possible lawfulness under certain conditions of Allen saying that which according to the plaintiffs' evidence he said, and thereby inducing the discharge of the plaintiffs, does not, upon the findings of the jury here, help his case. Just in the same way, it might have been urged, in answer to the claim of the plaintiff in *Temperton* v. *Russell* (3), that in regard to an inducement to a person to

(1) [1893] 1 Q. B. 715, at p. 728. (2) [1891] 2 Q. B. 545.
(3) [1893] 1 Q. B. 715.

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break a contract with another there may be cases, as was laid down by Lord Esher in *Bowen* v. *Hall* (1), in which such inducement is not actionable. "Merely to persuade a person," said Lord Esher, "to break his contract may not be wrongful in law or in fact, as in the second case put by Coleridge J. (in *Lumley* v. *Gye*)." (2) It is the malicious motive which renders the thing done wrongful, and, if damage ensues, actionable. In this case, as in *Temperton* v. *Russell* (3), the jury have found the motive of the defendant to be malicious, and thereby established the presence of that element, in the absence of which the conduct of the party sued, even if it produced a breach of contract, might not be a good ground of action. I am of opinion that the principle applicable to all these cases is the same—that any malicious disturbance of another in his calling or business causing him damage is an actionable wrong, whether it operates, if I may use the expression, by creating a breach of an existing contract, as in *Temperton* v. *Russell* (3), or as here, without creating any breach of contract, by depriving him of his actual and existing employment, or of the future employment which he would otherwise have had. It is the injurious and unjustifiable infringement of a profitable right.

This is no novel principle. It is stated, as I understand it, in the often-quoted judgment in *Keeble* v. *Hickeringill* (4) in the words: "He that hinders another in his trade or livelihood is liable to an action for so hindering him"; and again: "The other" (Holt C.J. is speaking of the kind of acts doing damage to a man's employment for which an action lies) "is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases."

The same principle underlies the decisions in the class of cases in which words are spoken in regard to a man's business, but not against a man's own character or conduct, of which *Riding* v. *Smith* (5) is an example, in regard to which Sir Frederick Pollock, in his work on Torts (3rd ed. p. 228), says that a special action on the case lies, under the old system of

(1) 6 Q. B. D. 333, at p. 338.
(2) 2 E. & B. 216, at p. 247.
(3) [1893] 1 Q. B. 715, at p. 728.
(4) 11 East, 574, n., at pp. 575, 576.
(5) 1 Ex. D. 91.

pleading, "analogous to those which have been allowed for disturbing a man in his calling, or in the exercise of a right in other ways."

In the case of *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), which naturally was much referred to in the argument before me, no doubt, as I understand the judgments in the House of Lords, was thrown in any of them upon the principle which I have stated. The plaintiffs there failed upon the facts; they failed to shew any "malice" in the defendants' conduct; they failed to prove any disturbance curtailing the liberty of the defendants to work for themselves. This is put by Lord Bramwell very clearly in the opening part of his judgment at p. 44: "The plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them. The plaintiffs admit that materially and morally they have been at liberty to do their best for themselves without any impediment by the defendants."

The case of *Jenkinson* v. *Nield* (2), decided by the Divisional Court (Mathew and A. L. Smith JJ.) in 1892, was also cited on behalf of the defendant Allen. But this case appears to me rather to confirm the view of the law which I adopt. The action was brought by a working tailor against the president of a branch of the Master Tailors' Association, for publishing a black-list of names of working tailors which included the plaintiff's name, asking all master tailors not to employ the persons whose names were in the list. The case is shortly reported; but it would seem that the county court judge and the Divisional Court which affirmed his decision held that the defendant was entitled to judgment on the express ground that there was no evidence of malice: "There was no evidence that the defendants were actuated by any other motive than self-interest. If that were so, and they were not desirous of injuring the plaintiff, that was not actionable."

(1) [1892] A. C. 25. (2) 8 Times L. R. 540.

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The last case upon which the defendants' counsel relied that I need notice was that of the *Corporation of Bradford* v. *Pickles* (1) in the Court of Appeal. There the plaintiffs claimed an injunction against the defendant to restrain him from constructing on his own land an underground tunnel, the effect of which would be to diminish, if not to cut off, the supply of water from springs which supplied the plaintiffs' waterworks. They alleged that the defendant was not legally entitled to construct the tunnel, and further, that he was not acting bonâ fide, but with the object of forcing the plaintiffs to buy him off. The Court held that the defendant was legally entitled to construct the tunnel, and further (and this was the point for which the case was cited for the defendant Allen in this case), that even if his intention in constructing the tunnel was that which the plaintiffs alleged, it did not give the plaintiffs the right to an injunction. The Lord Chancellor did not think that the alleged object of the defendant could be regarded as malicious. "The only question," said Lindley L.J. at p. 159, "a Court of Law or Equity can consider is whether the defendant has a right to do what he threatens and intends to do. If he has he cannot be interfered with, however selfish, vexatious, or even malicious his conduct may be. . . . This is not one of those cases in which an improper object or motive makes an otherwise lawful act actionable. It is not like libel or malicious prosecution, or what are called frauds on powers." The judgment of A. L. Smith L.J. on this point is to the same effect. The distinction between a case of the user of property, malicious, but not in itself unlawful, and such cases as that of *Temperton* v. *Russell* (2) or the present case is, I venture to think, clearly perceptible, although it may not be easy to give an apt expression of it in words. It is the distinction pointed out by Holt C.J., in the judgment to which I have already referred, between firing a gun to spoil your neighbour's decoy and setting up a decoy on your own ground with the same object, between driving away scholars from a neighbours' school by frightening them with a gun and setting up a rival school of your own. The distinction might, I think, be correctly, if not adequately, expressed by saying that in

(1) [1895] 1 Ch. 145. (2) [1893] 1 Q. B. 715.

such a case as *Corporation of Bradford* v. *Pickles* (1) and in the second case of each pair of illustrations put by Holt C.J., the malicious act does not effect any disturbance of the party hurt in any right or liberty of his. The act of the person who, on his own land, constructs the tunnel or sets up the decoy, or the rival school, if malicious in motive, does not go beyond the user of his own property in a lawful way; the neighbour who is hurt thereby cannot truly say that the act interferes with his liberty materially or morally (to borrow Lord Bramwell's words) to do his best for himself.

I now come to the second part of the present case—the claim against the defendants Knight and Jackson. Knight is, and has been for twenty-four years, the general secretary of the union. He is not a member of the executive council. He lives at Newcastle, where is also the registered office of the society. Jackson is the chairman of the society. He also lives at Newcastle. He is, of course, a member of the executive council of the society. Both came into the witness-box and gave evidence at the trial. In the statement of claim they were charged with conspiring with Allen. Of this, as I have already said, there was not the slightest proof.

The office of district delegate for the London branch which Allen holds is one to which the appointment is made by the vote of the society. Except as members of the society (if they voted on the occasion of his election) neither of these defendants had anything to do with the appointment. The district delegate is removable by the votes of the society and not by those of the executive council, and I asked the jury the question whether either of these defendants authorized Allen in what he did, and they answered this question, as I think they were bound to answer it, in the negative. But it is urged by the plaintiffs' counsel that nevertheless I ought to give judgment against them upon the finding of the jury on a further question which I put to them at the request of the plaintiff's counsel. That finding was, that the settlement of the dispute—the dispute in the Glengall Iron Company's yard—was a matter within the discretion of Allen.

(1) [1895] 1 Ch. 145.

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The only evidence in support of this finding may be very briefly stated. Rule 33, s. 1, of the society's printed rules provides: "Should a dispute arise in any shop or yard, the members of that shop or yard shall make the same known to the nearest branch. The officers of such branch shall try and settle such dispute." In his cross-examination Allen stated (this rule having been referred to): "In minor cases the executive council leave things to my discretion; I considered this a minor case." And in his re-examination he further stated: "I do not in cases of minor disputes refer to my committee." It should be added that the rule referred to goes on to enact: "but should a dispute arise in any shop or yard which cannot be amicably settled by the branch or district committee, it shall be referred to the executive council, who will give them" (the officers of the branch) instructions on the subject." I need not quote the rest of the rule; but I think it is clear that one effect of it is that under no circumstances will the society recognise the action of members who leave their work without the "dispute" which causes them to do so being first sanctioned by the executive council. These being the circumstances, the plaintiffs contend that, on the finding of the jury that the dispute was one of which the settlement was left to the discretion of Allen, Knight and Jackson are liable for his malicious act as being members of the society, whose rules give him a discretion in the settlement of disputes, or, at all events, as members of the executive council, because the executive council is the governing body of the society, and if the members of it left to Allen, as district delegate, such a discretion, they are liable for what he chose to do. It is argued that Allen was acting in a matter within the scope of his authority, and in furtherance of what he believed to be the interests of his employers. The well-known cases, of which *Green* v. *London General Omnibus Co.* (1), *Limpus* v. *London General Omnibus Co.* (2), *Abrath* v. *North Eastern Ry. Co.* (3), and *Edwards* v. *Midland Ry. Co.* (4) are examples, were cited in support of this contention. It was at the same time admitted that the relations

(1) 7 C. B. (N.S.) 290.
(2) 1 H. & C. 526; 32 L. J. (Ex.) 34.
(3) 11 App. Cas. 247.
(4) 6 Q. B. D. 287.

between these defendants and Allen was not that of master and servant. It was put rather as a case of the agency of Allen, in regard to the settlement of such a dispute according to his discretion, for every one of the members of the society, who, having by virtue of the rules entrusted Allen with a discretionary power to settle such a dispute, ought to be held liable for all acts of Allen, whether malicious or not, if done, in Allen's belief, on behalf of the society and in the performance of his duty in settling a dispute. It was further contended, and it was necessary, at any rate in Knight's case, to go that length, that the plaintiff was entitled to sue any member of the society for the damage caused by Allen's malicious act.

I cannot accede to these arguments. Looking at Allen's evidence and the findings of the jury as against him, I cannot hold that maliciously to inflict this wrong upon the plaintiffs because, in his view and the view of the ironworkers of the yard, they had, as he stated to the manager of the Glengall Iron Company, "been guilty of having done ironwork at Messrs. Mills & Knight's," was in any true sense an act within the scope of his authority, or proper to be done in furtherance of his duties as a district delegate, under rule 33, as to the settlement of the dispute. Allen's evidence is that he never threatened the Glengall Company with the withdrawal of the men at all, and that he knew that the withdrawal of the men from their work without the authority of the executive council would be against the rules. I agree that there are cases in which the relations between the principal and the agent and between the master and the servant, and the authority entrusted by the one to the other, are such that the principal or the master, as the case may be, may be liable for wilful and even for malicious wrongs committed by the agent or servant, provided that they are done on account of the principal or the master and for his purposes. But much, as has been pointed out (Pollock on Torts, 3rd ed. p. 83), must depend upon the nature of the matter in which the authority is given. There are cases in which the authority given to the agent was apparently very wide, where the principal has nevertheless been held not to be liable to third parties for tortious acts of his agent done in the course, as the agent believed, of his

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duty to his principal: *Bolingbroke* v. *Swindon Local Board* (1) and *Eggington* v. *Mayor of Lichfield.* (2)

In the present case I am certainly not prepared to hold that the effect of Allen having authority as a delegate acting under rule 33 to settle the dispute raised by the men in the Glengall Iron Company's yard on this occasion was such as to make Knight and Jackson, as members of the society, or the defendant Jackson, as a member also of the executive council, responsible to the plaintiffs for Allen's malicious injury to them.

I give judgment, therefore, for the defendants Jackson and Knight.

Judgment for the plaintiffs against the defendant Allen.
Judgment for the defendants Jackson and Knight.

The defendant Allen appealed, and also applied for a new trial on the ground of misdirection; and the plaintiffs appealed from so much of the judgment of the learned judge as directed judgment to be entered for the defendants Jackson and Knight.

April 3, 4. *Robson, Q.C.*, and *E. Morten*, for the defendant Allen. The ironworkers employed in the yard were doing nothing illegal in refusing to accept further employment in the yard if the plaintiffs were employed. Reasonably or unreasonably, they considered that the course they intended to follow was essential for the protection of their trade interests, and there is nothing to shew that they were actuated by any personal ill-will to the plaintiffs. That being so, they were doing nothing illegal in communicating to their employers their determination in the matter. If so, they could employ the defendant Allen to act as their mouthpiece for that purpose, and he would be doing nothing illegal in so acting. There was no evidence to shew that he had brought about the dispute. He was sent for after the dispute had arisen. The defendant Allen and those whom he represented were only doing that which they had a perfect legal right to do, and the law cannot infer malice from an act which is merely the exercise of a legal right. It is not like the case of a threat to commit some illegal act.

(1) L. R. 9 C. P. 575. (2) 5 E. & B. 100.

If the contention for the defendant be not correct, it would be practically impossible for a trade union to be carried on. There is no question here of maliciously inducing a person to break a contract, or of maliciously conspiring to induce a person not to enter into contracts with the plaintiffs, and, therefore, the case does not fall within the decision in *Temperton* v. *Russell.* (1) The passage in *Bowen* v. *Hall* (2), which is cited in *Temperton* v. *Russell* (1), cannot be taken in its full sense. The words, "if the persuasion be used for the indirect purpose of . . . benefiting the defendant at the expense of the plaintiff, it is a malicious act, . . . and therefore a wrongful act," must have some limitation placed upon them, for if not, the law would imply malice from a lawful act. The mere purpose of benefiting the defendant at the expense of the plaintiffs is not evidence of malice. There must be an indirect motive in the mind of Allen, namely, an intent to injure the plaintiffs, and that intent must be the dominant and operative motive in his mind: *In re Bird, Ex parte Hill.* (3) Apart from malice, Allen committed no wrongful act. He merely acted for the protection of the ironworkers' trade and to prevent a strike, and that was the dominant motive in his mind, and not the intent to injure the plaintiffs.

[They also cited *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (4); *Corporation of Bradford* v. *Pickles* (5); *Reg.* v. *Pemblitton* (6); *Ratcliffe* v. *Evans.* (7)]

J. Lawson Walton, Q.C., and *Rufus Isaacs*, for the plaintiffs, were only called upon to argue their cross-appeal. The defendants Jackson and Knight, who were members of this trade union, were liable for the acts of Allen. Under rule 33, s. 1, of the rules of the union, a dispute that could not be settled amicably was to be referred to the executive council; but the evidence shews that in minor cases Allen did not refer to the executive council, but was allowed to exercise his own discretion in dealing with them. Allen considered this a minor case, and the jury have found that the settlement of the dispute was within

(1) [1893] 1 Q. B. 715.
(2) 6 Q. B. D. 333, at p. 338.
(3) 23 Ch. D. 695.
(4) [1892] A. C. 25.
(5) [1895] 1 Ch. 145.
(6) L. R. 2 C. C. 119.
(7) [1892] 2 Q. B. 524.

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the discretion of Allen. Therefore Allen, having acted with the authority and in the interests of the union in dealing with this dispute, was the agent or servant of each member of the union, and each member is liable for his acts. This was the view taken by Lord Esher M.R. in *Temperton* v. *Russell*. (1) Allen having a general authority to act in such cases as this, his acts bind every member of the union so long as he acts within the scope of his authority. The third question ought not to have been left to the jury, the answer to the fourth question shewing that Allen, having a discretion to settle the dispute, had a general authority in the matter. Even, however, if Allen was not the agent of each member of the union to settle this dispute, he was clearly the agent of the executive council, who gave him a discretion to settle the dispute, and the defendant Jackson as a member of the executive council is liable. [They also cited *Limpus* v. *London General Omnibus Co.* (2)]

Murphy, Q.C., *Chester Jones*, and *L. G. Pike*, for the defendants Jackson and Knight, were not called upon.

LORD ESHER M.R. This is an action by two workmen against the defendants for having, in substance, maliciously and with intent to injure the plaintiffs, procured the plaintiffs' employers to discharge them from their employment, and to promise not to employ them again. That is the gist of the action.

The defendant Allen was the district delegate for London of the Boilermakers and Iron Shipbuilders' Union, the head office of the union being at Newcastle. A district delegate is not appointed by the executive council, but by the votes of the members of the union. Allen was therefore elected in this way to be a district delegate. To understand the position of a delegate we must see what such a delegation in this trade union means. It appears that Allen was called in by certain members of the union because they were offended with the plaintiffs, not for what they were doing in their then employment, but for what they had done when they were in the employment of some other masters at another place. The members of the union accordingly held a meeting, and resolved that they would

(1) [1893] 1 Q. B. 715, at p. 724. (2) 1 H. & C. 526; 32 L. J. (Ex.) 34.

not work in the same yard with the plaintiffs, and that, if the masters would not discharge the plaintiffs, they would insist upon the executive council ordering them to go out—that is to leave their employment. It is not denied that the men might have gone out if they pleased; but the truth is that they did not want to go out. They wanted to remain on in their employment, and what they really were insisting upon was that the plaintiffs should leave their employment. Allen was called in to confer with the men, and he took upon himself to forward their wishes. He did not do that because the men ordered him to do so. They could not give him any orders. He might under certain circumstances give them orders. If he undertook to do something that was wrong, he must be held personally liable for it. He adopted the views of the men with whom he had conferred for the good, as he thought, of the union, inasmuch as the plaintiffs had in another employment on a former occasion done a particular kind of work to which the members of the union took objection; and he went to the masters, and, for the purpose of punishing the plaintiffs for what they had done before, he told the masters that if they did not discharge the plaintiffs and promise not to employ them again, all the ironworkers would go out. It is useless to ask us to suppose that Allen did not mean by that to put pressure on the masters by intimating to them that they would be injured if they did not yield to what he said. His threat—for it was a threat—would have been idle if the masters would not have been injured by the ironworkers going out. That was the screw he was putting upon the masters. He knew that the masters could not afford to let the ironworkers go out, and he used that in this way: he told the masters that unless they discharged the plaintiffs the ironworkers would go out. The masters succumbed to that threat, and discharged the plaintiffs.

If Allen did what I have described, he is, in my opinion, liable whether he is an agent or not. It is said that he did not induce anybody to break any contract. Now, it is clear that merely to persuade a person who has contracted to break his contract gives no cause of action at all. But if it is done maliciously, for the purpose of injuring the person to whom the

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advice is given, or for the purpose of injuring some one else, the person against whom the malice is directed and carried out has a cause of action, not on the ground of the persuasion to break the contract, but on the ground of the malice directed against him. To my mind the result is the same whether the persuasion is to break a contract or not to make a contract. One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But if the first person uses that persuasion with intent to injure the other, or to injure the person with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful. That law has been laid down by this Court in *Bowen* v. *Hall* (1), where it is said that, "if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." The same question came again before the Court in *Temperton* v. *Russell* (2), where the above passage was cited and the same view was expressed in perfectly clear terms. There is, therefore, authority binding on this Court that an act, which may be lawfully done to the injury of another if done without malice, is made unlawful if done with malice, and gives a right of action if injury ensues. We have been invited to define malice. One cannot do so any more than one can define fraud, and I certainly shall not attempt it. Every one knows what is meant by a man acting maliciously. The only recognised tribunal that can decide whether an act is or is not malicious is a jury. There was evidence upon which the jury could come to the conclusion that what Allen did amounted to a threat to the plaintiffs' employers that if they continued to employ the plaintiffs, and did not undertake not to employ them again, they would be injured in their business, and that his motive was to punish the plaintiffs for what they had done previously, and to interfere with their liberty of earning their livelihood in the future; and therefore the jury had a right to find, and by their answers to the first two questions put to

(1) 6 Q. B. D. 333, at p. 338. (2) [1893] 1 Q. B. 715.

them by the learned judge they have found, that Allen acted maliciously. That therefore entitles the plaintiffs to succeed in this action against Allen for the damage caused thereby.

With regard to the claim against Jackson and Knight, I do not intend to inquire into the exact position within the union of the officers of this trade union. But this is clear, that the mere fact of Allen being a district delegate, as it is called, does not make him the servant of anybody, and, as far as I understand the rules and practice of the union, it is not intended that he should be the servant of any member of the union. He is intended to be the protector and adviser of the members of the union, and he can give orders to them. His relation to the members is not that of a servant to a master. It is then said that he is the agent of the members of the union—that is to say, that every member of the union stands in the relation of a principal to Allen. If that were so, a member could terminate the relationship at any time he pleased. The relation of principal and agent must be brought about by the consent of the parties to that relation; and if neither of the parties means the relation to be that of principal and agent, the relation is not created. It is absurd to suppose that any member of the union thought that Allen was to be his agent, or that Allen intended to be his agent. If either was to be the principal, it was to be Allen. The members were to do what he or the executive council told them. In truth there was no such relation between them.

Therefore, the answers to the first two questions made Allen liable. The third question ought not to have been put to the jury, because there was no evidence in support of it. Nor ought the fourth question, which I am bound to say the learned judge was specially requested to ask the jury, to have been put; indeed, I must confess that I fail to understand the meaning of it. The result is that the defendant Allen is liable, but that the defendants Jackson and Knight are not liable. Both appeals will therefore be dismissed.

LOPES L.J. I am of the same opinion. This is an action by two shipwrights against three defendants—Allen, the district delegate of the Boilermakers and Iron Shipbuilders' Union, and

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Jackson, the chairman, and Knight, the general secretary of the union, for maliciously and wrongfully and with intent to injure the plaintiffs inducing the Glengall Iron Company, who at the time were the employers of the plaintiffs, to discharge the plaintiffs from their employment. The jury found that Allen did induce the Glengall Iron Company as alleged; but it is contended that that finding of the jury cannot be supported because there was no evidence of malice, and therefore no evidence of any wrongful act on the part of Allen. It is perfectly clear, as has been said by the Master of the Rolls, that any person may advise another person to discharge a servant, or to break a contract, and he is not answerable for that alone in any respect. But may he advise another person to discharge a servant, or to break a contract, with intent to injure the servant, or one of the parties to that contract? In my judgment, that is a question of law, which has been determined in the cases of *Bowen* v. *Hall* (1) and *Temperton* v. *Russell*. (2) I understand the last-mentioned case to lay down this broad principle, that a person who has induced a party to a contract to break it, intending thereby to injure another person, commits an actionable wrong; and I can see no distinction between inducing a party to a contract to break it and inducing a person to discharge a servant, as in the present case. It is said that there is no evidence of malice—no evidence of any wrongful act. I do not propose to attempt exhaustively to define malice; but I do say this, as being applicable to the present case, that when a person wilfully does an act to the injury of another, without any lawful cause, that is evidence of malice. Did that state of things exist here? To my mind, there can be no doubt that Allen went to the employers with intent to injure the plaintiffs. The evidence was to the effect that Allen said that he did it to punish the plaintiffs for what they had done on a previous occasion. It seems to me, therefore, clear that he went for the purpose of injuring the plaintiffs, and that he did injure them because they were discharged. Was there then any lawful excuse, any lawful cause, for his so acting? To my mind, none whatever. He might, if he thought fit, have withdrawn the ironworkers, or the ironworkers

(1) 6 Q. B. D. 333. (2) [1893] 1 Q. B. 715.

might have withdrawn of their own accord, from the work. But what right had he to go to the employers and induce them to discharge the plaintiffs? It seems to me that, if my proposition given above is correct, this case is brought well within it, and there was abundant evidence upon which the jury might find as they did. That disposes of the case so far as Allen is concerned, and his appeal must be dismissed.

With regard to the appeal in the case of Jackson and Knight, it has been found by the jury, and in my opinion correctly found, that they did not authorize Allen to act as he did, and therefore it must be taken that they did not maliciously induce the Glengall Iron Company to discharge the plaintiffs. I cannot help thinking that the judge would have been justified, at the end of the plaintiffs' case, in ruling that there was no evidence against Jackson and Knight. They were both of them at Newcastle, and were never upon the scene when the interview between Allen and the employers took place. They took no part in the matter, and they probably knew nothing of what Allen was doing. It is said, however, that they are nevertheless liable, and a legal argument has been addressed to us which is perfectly sound, but which depends upon a fundamental fact which the plaintiffs have entirely failed to establish. It depends upon the fact being established that Allen was an agent or servant. There is no evidence to shew that he was, and I do not believe that he was. The result is that this appeal must also be dismissed.

RIGBY L.J. I am of the same opinion. As regards the question whether in the class of cases with which we are dealing what would otherwise be a legal act may be made illegal by the addition of an intention to injure another person, who is in fact injured, I have only to say that I consider that we are bound by the case of *Temperton* v. *Russell*. (1) In other branches of the law as regards property there are well-known cases in which a man exercising a right of property is not made responsible on the ground that he acted with a view to injure another person. This is contrary to the civil law, and it appears to me to be

(1) [1993] 1 Q. B. 715.

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contrary to the law of Scotland; but in our law it is well established, and if the matter were res integra there might be something to be said in favour of extending that principle to cases of this kind. To my mind, however, *Temperton* v. *Russell* (1) has settled the question, and I am not at liberty to go behind that decision.

With regard to the cross-appeal, I cannot see any principle upon which Allen can be treated as the agent or servant of each member of the union. I lay aside the special position of the members of the executive council, for I see nothing material in it affecting this question. I see no foundation for saying that Allen can be treated as the agent or servant of each member of the union. He seems to me to be in a very different position. The real meaning of these rules is this: that each member shall give up his private opinion, and that the members shall choose persons who shall direct the opinion of the whole. They choose persons who are more like masters than servants, and more like principals than agents. I do not say that they are either the one or the other, but they are not agents or servants. If such a general proposition as that contended for were true, I see no reason why every member of a London club should not be personally responsible, not only for the acts of the committee, but for the act of any servant of the club should he do anything that caused an injury to another person. I agree, therefore, that both appeals should be dismissed.

Appeals dismissed.

Solicitors for the plaintiffs: *C. J. Smith & Gofton.*
Solicitors for the defendants: *Shaen, Roscoe, Massey & Co.*

(1) [1893] 1 Q. B. 715.

A. M.

In re THE COUNTY COUNCIL OF KENT AND THE SANDGATE LOCAL BOARD.

1895
April 9;
May 17.

Local Government—Differences to be determined by Arbitration of Local Government Board—Procedure—Power of Court to order Statement of Special Case—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 11, *sub-s.* 3; *ss.* 63, 87—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 24.

Where under the Local Government Act, 1888, differences are directed to be determined by arbitration of the Local Government Board, the board must proceed under s. 63 of that Act, with the consequence that they or the arbitrator appointed by them may be compelled, under the Arbitration Act, 1889, to state a case for the opinion of the Court.

The board are to proceed under s. 87 only where differences are by the Act directed to be determined by the Local Government Board otherwise than by arbitration.

APPEAL from chambers.

On or about April 6, 1883, a road in the district of the Sandgate Local Board, which is the urban authority for the urban sanitary district of Sandgate, became a main road. On or about March 11, 1890, the urban authority claimed, under s. 11, sub-s. 2, of the Local Government Act, 1888, to retain the powers and duties of maintaining and repairing the said main road. In the result the county council and the urban authority failed to agree on the amount of the annual payment to be made by the county council to the urban authority towards the costs of the maintenance of such road; and in the absence of such agreement the amount of such payment came to be determined by arbitration of the Local Government Board pursuant to s. 11, sub-s. 3 (1), of the said Act. On September 20 and October 18,

(1) The Local Government Act, 1888, provides as follows:—

By s. 11, sub-s. 3, "The amount of the payment" to be made by a county council to an urban authority towards the cost of maintenance by such authority of main roads within their district "shall be such annual sum as . . . . in the absence of agreement may be determined by arbitration of the Local Government Board."

By s. 63, "Where the Local Government Board are required in pursuance of this Act to decide any difference or other matter referred to arbitration in pursuance of this Act, the provisions of the Regulation of Railways Act, 1868, respecting arbitrations by the Board of Trade, and the enactments amending those provisions, shall apply as if they were herein re-enacted, and in terms made applicable to the Local

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1893, the county council and the urban authority respectively, at the request of the Local Government Board, executed a submission to arbitration. The Local Government Board under s. 87 appointed Thomas Codrington, one of the inspectors of the board, to hold a local inquiry with respect to the matter in dispute. In the course of the inquiry the counsel for the county council gave the said Thomas Codrington notice that they desired to have a case stated upon certain questions of law which arose in the case under the Arbitration Act, 1889. Subsequently the county council applied to Day J. at chambers under s. 19 of that Act for an order that the Local Government Board or Thomas Codrington should state in the form of a special case for the opinion of the Court the several questions of law which had arisen or might arise in the course of the reference. The judge made the order as prayed. From that order the Local Government Board appealed.

Sir R. T. Reid, A.-G., and *H. Sutton*, for the Local Government Board. Neither the board nor Mr. Codrington can, having regard to the procedure which has been adopted in this case, be ordered to state a case under the Arbitration Act. The machinery for the conduct of arbitrations by the Local Government Board in disputes arising under the Local Government Act, 1888, is provided by ss. 63, 87. It is optional for the Board to proceed in any case under either one or other of those sections. If they proceed under s. 63, and appoint an arbitrator to act for them under s. 30 of the Regulation of Railways Act, 1868, then by s. 32 of that latter Act the provisions of the Railway Companies Arbitration Act, 1859, are to apply, by s. 29 of which Act the submission to arbitration may be made a rule of Court. If, therefore, the board had appointed Mr. Codrington as an

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Government Board and the decision of differences and matters under this Act."

By s. 87, sub-s. 1, "Where the Local Government Board are authorized by this Act to . . . . determine any difference . . . . they may cause to be made a local inquiry, and in that case . . . . sections 293 to 296, both inclusive, of the Public Health Act, 1875, shall apply as if they were herein re-enacted, and in terms made applicable to this Act."

arbitrator under s. 63, it is conceded that the Court would have power to order him to state a case. But the board elected to proceed under s. 87, and directed a local inquiry. Under those circumstances s. 295 of the Public Health Act, 1875, applies, by which "all orders made by the Local Government Board shall be binding and conclusive." In *Newry and Enniskillen Ry. Co.* v. *Ulster Ry. Co.* (1) it was held that the Board of Trade were not in the position of private arbitrators, and had a discretion which the Court could not control. And in *Bexley Local Board* v. *West Kent Sewerage Board* (2) it was held that the Local Government Board, who had to decide a dispute between the parties under a local Act, had no power to state a case for the opinion of the Court. [They also referred to *Parsons* v. *Lakenheath School Board.* (3)]

Reginald Bray (*Finlay, Q.C.*, with him), for the Kent County Council. This is an "arbitration under an Act" within the meaning of s. 24 of the Arbitration Act, 1889 (4), none the less because there has in fact been a submission to arbitration. And the Arbitration Act is not inconsistent with the Local Government Act, 1888. The matters which are referred to the determination of the Local Government Board under that Act are of two kinds—administrative and judicial. Their determinations upon the former are not subject to the control of the Court, but their determinations upon the latter are so. The object of the Act in requiring such matters to be referred to the arbitration of the Board was merely to prevent actions from being brought, not to make their decision an Act of State. The case of *Bexley Local Board* v. *West Kent Sewerage Board* (2) was decided before the Act of 1889 was passed, and turned upon s. 5 of the Common Law Procedure Act, which only gave power to state a case where there had been a submission to arbitration,

(1) 8 D. M. & G. 487.

(2) 9 Q. B. D. 518.

(3) 58 L. J. (Q.B.) 371.

(4) By the Arbitration Act, 1889, s. 24, "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognised by that Act."

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and not where there had been a compulsory reference under an Act of Parliament.

Sutton, in reply.

Cur. adv. vult.

May 17. The judgment of the Court (Cave and Lawrance JJ.) was read by

CAVE J. This is an appeal from an order of my brother Day at chambers, ordering that the Local Government Board or Thomas Codrington should state in the form of a special case for the opinion of the Court the several questions of law which have arisen or may arise in the course of the reference therein. The order is supported both by the county council and the urban authority. The Local Government Board was constituted by the Local Government Board Act, 1871. The present question arises under s. 11, sub-s. 3, of the Local Government Act, 1888. Certain differences likely to arise under that Act are to be settled in manner provided by the Act as follows: By s. 2, sub-s. 3 (*a*), the number of the county councillors and their apportionment between each of the boroughs which have sufficient population to return one councillor and the rest of the county shall be *such as the Local Government Board may determine.* By s. 11, sub-s. 3, already cited, the amount of the payment (to be made by the county council to the urban authority towards the costs of such maintenance and repair of a main road) shall be such annual sum as may be from time to time agreed on, or in the absence of agreement *may be determined by arbitration of the Local Government Board.* Sect. 11, sub-s. 4, provides that a county council may require a district council to undertake the maintenance and repair, &c., of any main road in consideration of such annual payment by the county council for the costs of the undertaking as may from time to time be agreed upon, or in case of a difference *be determined by arbitration of the Local Government Board.* Sect. 11, sub-s. 6, provides that if any difference arises between a county council and any highway or sanitary authority as respects the authority in whom any drain used for any purpose in connection with the drainage of any main road is vested, or as to

the use of any sewer or other drain, the council, or the highway or sanitary authority, may require such difference to be referred to arbitration, and the same *is to be referred to arbitration in manner provided by that Act.* By s. 11, sub-s. 9, if any difference arises under that section between a county council and a district council as to the refusal of the county council to make a payment under that section to the district council in respect of any undertaking or road, or as to a road having been placed in proper repair and condition previously to its becoming a main road, or as to any notice given to the district council by the county council to place a road in proper repair and condition, such difference shall, if either council so require, *be referred to the arbitration of the Local Government Board.* By s. 12, sub-s. 2, the sums to be paid by the county council for the county of Southampton to the Isle of Wight Highway Commissioners, in respect of the repairs and maintenance of the Isle of Wight roads, are to be such sums as may be agreed upon, or in case of difference *be settled by arbitration under that Act.* By s. 22, the shares of the different county councils of the probate duty grant *are to be estimated in such manner as the Local Government Board direct.* By s. 24, sub-s. 6, the guardians, authority, or the officer to whom a sum is payable under that section on the certificate of the Local Government Board, are to submit to the board their claim to the payment in such manner and produce such evidence and comply with such rules *as the board from time to time require or make.* By s. 26, sub-s. 1, *the Local Government Board is to certify the sum expended* by the guardians of each poor law union on salaries, &c. By s. 26, sub-s. 2, *the Local Government Board is to fix a day* on which the rateable value of a poor law union situate in more than one county is to be taken. By s. 32, sub-s. 3 (*b*), the terms on which a borough, to which a grant of quarter sessions is made, is to redeem its liability to contribute to the costs of the county, quarter, and petty sessions may be agreed upon, or in default of agreement *may be determined by arbitration under that Act.* Sect. 32, sub-s. 3 (*c*), provides for reference to *arbitration under the Act.* By s. 33, sub-s. 2, where it is necessary to ascertain the rateable value of a county and a county borough, it is to be ascertained by a joint committee, and

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the number of representatives for the county and each county borough respectively *shall be settled in default of agreement by the Local Government Board.* By s. 50, sub-s. 3, any difference as to the county which contains the largest portion of the population of such district as is referred to in that section *shall be referred to the Local Government Board, whose decision shall be final.*

It will be seen from the foregoing extracts that any differences which may arise and which are not specifically provided for are to be settled (1.) by arbitration under this Act, (2.) by arbitration of the Local Government Board, or (3.) by the Local Government Board, without specifying in what way. Subsequent portions of the Act appear to be devoted to specifying how these three modes of adjusting differences are to be carried out. By s. 62, sub-s. 2, "In default of an agreement as to any matter requiring adjustment for the purpose of this Act or any matter which, in case of difference, is to be referred to arbitration, then, if no other mode of making such adjustment or determining such difference is provided by this Act, such adjustment or difference may be made or determined by an arbitrator appointed by the parties, or in case of difference as to the appointment, appointed by the Local Government Board." By s. 62, sub-s. 3, an arbitrator under the Act is to be deemed to be an arbitrator within the meaning of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration are to apply accordingly; and further, the arbitrator may state a special case, and, notwithstanding anything in the said Acts, is to determine the amount of the costs, and to have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily. By s. 63, where the Local Government Board are required in pursuance of the Act to *decide any difference or other matter referred to arbitration* in pursuance of the Act, the provisions of the Regulation of Railways Act, 1868, respecting arbitrations by the Board of Trade, and the enactments amending those provisions, are to apply as if they were re-enacted and in terms made applicable to the Local

Government Board and the decision of differences and matters under the Act. By s. 87, sub-s. 1, where the Local Government Board are authorized by the Act to make any inquiry, *to determine any difference*, to make or confirm any order, to frame any scheme, or to give any consent, sanction, or approval to any matter, or otherwise to act under the Act, they may cause to be made a local inquiry, and in that case and also in a case where they are required by the Act to cause to be made a local inquiry, ss. 293 to 296, both inclusive, of the Public Health Act, 1875, are to apply as if they were therein re-enacted and in terms made applicable to the Act.

It appears, therefore, that the Act specifically provides for the mode in which differences are to be settled. When they are to be settled by an arbitration under the Act, s. 62 applies. Where the Local Government Board are to decide any difference or other matter referred to arbitration, s. 63 is to apply. Now s. 63 must be intended to apply to cases where the difference is to be determined by arbitration of the Local Government Board. This, indeed, was not disputed by the Attorney-General and Mr. Sutton, but they contended that s. 87 also applied to such differences. We are of opinion, however, that s. 87 is confined to the cases of difference which are to be determined by the Local Government Board otherwise than by arbitration, but that where the difference is to be determined by arbitration of the Local Government Board the mode of so determining it is provided by s. 63, and by that section only.

Some cases were cited, which however have very little bearing on the point in dispute. In *Newry and Enniskillen Ry. Co.* v. *Ulster Ry. Co.* (1) it was held that the Board of Trade and Commissioners of Railways were not by the Act there in question placed in the position of private arbitrators. It is sufficient to say that that Act had no section equivalent to s. 63 of the Act of 1888. It has not been suggested that if the Board of Trade appointed an arbitrator under s. 63 and the Regulation of Railways Act, 1868, he would not be governed by the ordinary legal principles which attach to private arbitrators. The next case is *Parsons* v. *Lakenheath School Board* (2), in which Lord

(1) 8 D. M. & G. 487. (2) 58 L. J. (Q.B.) 371.

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Field (then Field J.) appears to have thought that under rule 20 of the Regulations as to Triennial Elections, 1886, the Education Department was intrusted with judicial duties which it must perform in the ordinary judicial way. The case has no bearing that I can see on the matter here in dispute. The third case, *Bexley Local Board* v. *West Kent Sewerage Board* (1), had still less to do with the matter in hand. The only other question is whether the Arbitration Act of 1889 applies to arbitrations under s. 63 of the Act of 1888. By s. 19 of the Arbitration Act, any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. The power was new when the Act was passed, but is most beneficial, and I can see no reason, and indeed none has been suggested, why it should not apply to an arbitrator appointed by the Local Government Board under s. 63. The only difficulty in the case is that the Local Government Board have purported to proceed under s. 87, which in our judgment is not applicable, instead of under s. 63, which is. Probably the best course will be that the Local Government Board should appoint Mr. Codrington an arbitrator under s. 63, and that without going to the expense of taking the evidence over again he should by consent (and the parties to the arbitration are, I understand, quite ready to consent) state the case as ordered by my brother Day.

Appeal dismissed.

Solicitors for the Local Government Board: *Sharpe, Parkers & Co.*

Solicitors for the Kent County Council: *Palmer & Bull, for Brennan & Turner, Maidstone.*

Solicitors for the Sandgate Local Board: *Talbot & Tasker, for Brockman, Folkestone.*

(1) 9 Q. B. D. 518.

J. F. C.

BOWER *v.* HETT.

1895
May 14.

Bankruptcy—Assets—Execution — Money paid under an Execution—Money paid to avoid Sale—Rights of Execution Creditor and Trustee—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2.

The provision in s. 11, sub-s. 2, of the Bankruptcy Act, 1890, by which the trustee is entitled, as against the execution creditor, to money paid under an execution in order to avoid sale, does not affect the case of money paid to prevent seizure, and the execution creditor is entitled to such money as against the trustee.

The defendant, the high bailiff of a county court, was entrusted by the plaintiff with a warrant to levy execution on the goods of a judgment debtor. He seized, but withdrew from the premises under an arrangement with the debtor. The next day the debtor absconded. The defendant then obtained the key of the premises, but gave it up to the debtor's father on the father's promise to pay the amount of the debt, which he paid to the defendant on the following day. The plaintiff did not hear of this payment until some days later. Within fourteen days after such payment the defendant had notice of a bankruptcy petition presented by the debtor, on which a receiving order was made. The defendant paid the amount of the debt to the official receiver, and the plaintiff sued to recover the amount so paid:—

Held, that the money paid by the debtor's father was not paid "under an execution," nor "paid in order to avoid sale," within the meaning of s. 11, sub-s. 2, of the Bankruptcy Act, 1890, and therefore the defendant was not justified in paying it to the official receiver, and the plaintiff was entitled to recover for money received by the defendant to his use.

Appeal by the plaintiff from the judgment of the judge of the county court at Hull, in an action brought by the plaintiff, an iron merchant at Hull, against the defendant, the high bailiff of the county court at Brigg, to recover a sum of 23*l.* 15*s.* 8*d.*

On September 28, 1894, the plaintiff recovered judgment in the Brigg County Court against a person named Denton for 23*l.* 15*s.* 8*d.* On September 29 a warrant of execution was issued to the defendant, as high bailiff, empowering him to levy the amount of the judgment debt. On Monday, October 1, the defendant went to Denton's premises and shewed him the warrant. An arrangement was then entered into between the defendant and Denton, by which Denton agreed that the defendant should be at liberty to come into possession again when he

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pleased. The defendant then went out of possession, and Denton for the time continued to carry on his business. On October 2 Denton closed his premises and absconded. The defendant thereupon obtained the key of Denton's premises from the shopman; and afterwards, on October 3, Denton's father went to the defendant, and promised that if the defendant would give up to him the key of Denton's premises, he would pay the amount of the plaintiff's judgment, and also the amounts of two other judgments in respect of which the defendant held warrants against Denton. On October 4 Denton's father paid to the defendant the amount of these three judgments. The defendant retained the amount of the plaintiff's judgment, and did not communicate to the plaintiff the fact of the payment, and the plaintiff did not become aware of it until October 18. On October 15 the debtor presented a bankruptcy petition, of which notice was given to the defendant, on October 16, by means of a telegram sent to him by the official receiver. A receiving order was made against Denton, and he was adjudged bankrupt. The official receiver demanded from the defendant the money which had been paid to him by Denton's father in respect of the plaintiff's judgment, and the defendant paid the amount, 23*l.* 15*s.* 8*d.*, to the official receiver. The present action was brought to recover that sum. The county court judge came to the conclusion that what took place on October 1 amounted to a seizure by the defendant of Denton's goods, and was of opinion that the sum of 23*l.* 15*s.* 8*d.*, paid by Denton's father to the defendant on October 4, was paid "under an execution," and was "money paid in order to avoid sale," within the meaning of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 2 (1),

(1) 53 & 54 Vict. c. 71, s. 11, sub-s. 2: "Where under an execution in respect of a judgment for a sum exceeding 20*l.*, the goods of a debtor are sold, or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

and, therefore, that the defendant was justified in paying the money to the official receiver, and gave judgment for the defendant.

C. Montague Lush (*Sidney Clarke*, with him), for the plaintiff, in support of the appeal. The county court judge was wrong in holding that the money was paid in order to avoid sale, and, that being so, the provisions of s. 11, sub-s. 2, of the Bankruptcy Act, 1890, have no application, and the plaintiff is entitled to recover. In the first place he is entitled to the money paid by the debtor's father as money received by the defendant to his use; but, even if this is not so, he is entitled to the amount as damages for the defendant's breach of duty, for it is clear that the defendant failed to carry out the duties imposed upon him by the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 146, 147, and 154; nor has he given the notice required by Order II., r. 32, of the County Court Rules, 1889. The clause referred to in the Bankruptcy Act, 1890, is a provision limiting the rights of judgment creditors, and ought to be construed strictly. The words "money is paid in order to avoid sale" apply only to cases where the sheriff or the high bailiff, as the case may be, is in a position to sell. Here the high bailiff had gone out of possession, and could not have sold, when the money was paid, and the object of the payment was, not to avoid sale, but to avoid seizure. Moreover, this money, which was voluntarily paid by the debtor's father, cannot be said to have been paid "under an execution." The correct view of the construction of s. 11 is that suggested in Williams's Bankruptcy Practice (1) as follows: "The new sub-sections reproduce those formerly contained in the principal Act, but with the important additions . . . that the provisions of sub-s. 2 are to apply not only in the case of a sale, but also where money is paid to avoid sale. These sub-sections will alter the law as laid down in *Stock* v. *Holland* (2), *Re Pearson, Ex parte West Cannock Colliery Co.* (3), where it was held that money paid to avoid sale belonged to the creditor and not to the trustee, but would not seem to affect the case of money

(1) 6th ed. p. 211.

(2) L. R. 9 Ex. 147.

(3) 3 Morrell, 187.

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paid to prevent seizure, which was held in *Ex parte Brooke, In re Hassall* (1) to belong to the creditor."

[He also referred to *Blades* v. *Arundale* (2); *Crowder* v. *Long* (3); *Clifton* v. *Hooper*. (4)]

Dodd, Q.C., for the defendant. There was a seizure on October 1, and the county court judge has so found as a fact. That what was done amounted in law to a seizure is shewn by the case of *Gladstone* v. *Padwick*. (5) Then, as the payment was made after the seizure, it must be taken to have been made under the execution, and in order to avoid sale. "Under an execution" means no more than by virtue of, or in consequence of, an execution. The section cannot be limited to cases where it is the debtor's own money that is paid, or where the money is paid by him or with his assent. In order to adopt the plaintiff's construction it would be necessary to read into the section, after the words "money is paid," some such words as "by the debtor or with his assent." The section ought to be construed literally. The words which now appear are substituted for the words "where the goods of a debtor are taken in execution," which occurred in the now repealed s. 46, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). The policy of the legislature, as shewn by successive enactments, has been to limit the remedies of judgment creditors, with a view to securing equal distribution of the debtor's estate among all the creditors. The present case comes within the exact words of the section. As to the question of seizure, *Bissicks* v. *Bath Colliery Co.* (6) is a strong authority in the defendant's favour.

[CHARLES J. referred to *Slater* v. *Pinder*. (7)]

Lush was not heard in reply.

LORD RUSSELL of KILLOWEN C.J. (after stating the facts proved at the trial). I am of opinion that the judgment of the county court judge ought to be reversed. One matter which was in controversy was as to what took place on October 1. I have

(1) L. R. 9 Ch. 301.
(2) 1 M. & S. 711.
(3) 8 B. & C. 598.
(4) 6 Q. B. 468.
(5) L. R. 6 Ex. 203.
(6) 3 Ex. D. 174.
(7) L. R. 6 Ex. 228; 7 Ex. 95.

come to the conclusion that there was evidence on which the county court judge was justified in finding that there was then a seizure. But then the defendant leaves the premises, and gives up possession; and in so doing he did not take the right course. I come to the conclusion, so far as the question of seizure is material, that there was a seizure on October 1. Then on October 3 the position was this. The defendant had seized on October 1, but he had abandoned possession, and therefore on October 3 he was not in possession, nor in a position to sell. Then the debtor's father comes forward, and says he will pay the amount of the judgment debt on the following day. I can see no evidence to negative the presumption that the debtor's father paid his own money out of his own pocket in order to save his son from the disgrace of having his goods taken in execution. The money which was then paid was the money of the father, and it never became the property of the debtor. I come therefore to the conclusion that the money was so dealt with that it passed directly from the debtor's father to the defendant as high bailiff. The father would have had no right of action against his son, nor any right of proof against the son's estate. Then on October 15 the debtor filed a bankruptcy petition; and on the 16th notice of the petition was given to the defendant, who some time afterwards paid over the amount of the judgment debt to the official receiver.

Two points are suggested on behalf of the plaintiff. The first is, that, if this payment was not a payment in order to avoid a sale, within the meaning of s. 11, sub-s. 2, of the Bankruptcy Act, 1890, the defendant had no business to pay the money to the official receiver; that he paid at his own risk, and cannot be heard to say that he erroneously paid to the wrong person. The other point is, did he pay the money to the wrong person? That depends on the construction of s. 11, sub-s. 2, of the Bankruptcy Act, 1890. On that sub-section there arise several questions. In the first place it is argued that in order that the sub-section may apply, there must be a seizure. In my judgment, there was a seizure on October 1. I am inclined to think it is necessary that there should be a seizure; but it is unnecessary to decide this question, for there was one. The next question is whether

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there was a payment "under an execution." The words are not "in consequence of," or "after," an execution. The expression "under an execution" seems to me to mean under pressure or stress of an execution. On the whole I think that this money was not paid under an execution. The next question is, was this a payment "in order to avoid sale"? I am of opinion that it was not. On the contrary, it was made in order to avoid seizure. The last question is, does the clause mean a payment which may be made by any one? I can see no good reason for holding that it does. The policy and object of the statute is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active. But can it be said that if a person who is wholly outside the bankruptcy, and who does not pay the money in such a way as to make it the property of the bankrupt, pays money without the knowledge of the bankrupt, this money should go to the creditors? I come to the conclusion that this money was the money of the debtor's father, and was paid without the request of the son, for there was no evidence of any such request. The money never became part of the property of the son. For these reasons I am of opinion that this was not a payment in order to avoid sale. In some cases the judges have said that the moment the sheriff is paid the amount of the judgment debt he becomes a debtor to the execution creditor. For instance, in *Morland* v. *Pellatt* (1), Littledale J. said in the course of the argument, "When the sheriff received the money, he became liable to an action, for money had and received, by the plaintiff in that suit." That is a statement to the effect that when once the money was paid, a right of action was vested in the judgment creditor.

For these reasons I am of opinion that the plaintiff is entitled to judgment.

CHARLES J. I am of the same opinion. The first question is whether the money was paid "under an execution," within the meaning of s. 11, sub-s. 2. We may take it that there was a seizure on October 1, for the county court judge came to the

(1) 8 B. & C. 722.

conclusion that there was. But the possession which had been taken was abandoned under an arrangement between the judgment debtor and the defendant, and when the debtor's father brought the money and paid it the goods were not in the high bailiff's possession. I think the father did not pay the money "under an execution." He may have paid it in consequence of an execution, but to come within the section the payment must be "under an execution." That being so, s. 11, sub-s. 2, in my judgment has no application. But assuming that it does apply, further difficulties arise. The expression, in sub-s. 2, "the goods of a debtor are sold," is clear, and must mean goods which are the debtor's own property, and the next words, "or money is paid in order to avoid sale," must, in my opinion, be read with the previous words, and must mean money which is the debtor's own. The words appear to refer to the debtor's own money, paid, either by himself or by some other person on his behalf, in order to avoid a sale. In the present case there is no evidence of such a state of facts. The money was the money of the debtor's father, and I do not think the high bailiff was entitled to keep it. Again, the father paid the money, not to avoid sale, but to avoid seizure, for he paid it to prevent the high bailiff from taking possession. For these reasons I am of opinion that the plaintiff is entitled to succeed. As to the question whether the action lies against the high bailiff, the authorities shew that he held the money as money received to the use of the execution creditor.

Appeal allowed.
Leave to appeal granted.

Solicitors for plaintiff: *Oldman, Clabburn & Co., for C. E. Gresham, Hull.*

Solicitors for defendant: *Collyer-Bristow, Russell, Hill & Co., for Laverack & Son, Hull.*

P. B. H.

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May 9.

TIMMIS, APPELLANT; ALBISTON, RESPONDENT.

Municipal Corporation — Election — Continuous Occupation — Change in Character of Occupation — Transfer of whole of qualifying Premises and New Tenancy of Part — Municipal Corporations Act, 1882 (45 & 46 *Vict.* c. 50), s. 9.

The appellant, who was the occupier of certain premises, transferred them to a company, and on the same day took from that company a demise of part of the premises, which he continued to occupy :—

Held, that there had been no break in the appellant's occupation of that part of the premises sufficient to disentitle him to be enrolled as a burgess under s. 9 of the Municipal Corporations Act, 1882.

CASE stated by the revising barrister for the borough of Widnes.

The appellant and one Gossage had for some years carried on business and occupied certain premises at Widnes.

On May 24, 1894, having turned their business into a limited company, they transferred these premises to the company, and on the same date the company demised to the appellant a room which he had used as an office and which formed part of such premises, and which was known and numbered as 115, Waterloo Road. He continued to occupy this office down to the date of claim.

He claimed to be inserted on the list of burgesses for the borough of Widnes in respect of the tenement 115, Waterloo Road (the tenement not being of sufficient value to carry the parliamentary franchise); but he was objected to by the respondent on the ground that he had not continuously occupied 115, Waterloo Road for twelve months prior to July 15, 1894. (1)

The revising barrister upheld the objection, but stated this case for the opinion of the Court.

(1) By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9, "A person shall not be entitled to be enrolled as a burgess unless he . . . . is on the fifteenth of July in any year, and has been during the whole of the then last preceding twelve months, in occupation, joint or several, of any house, warehouse, counting-house, shop, or other building . . . . in the borough."

Joseph Walton, Q.C., and *W. H. Butler*, for the appellant. The revising barrister was wrong. The appellant had occupied 115, Waterloo Road for the whole of the qualifying period. No doubt prior to May 24, 1894, he occupied it in addition to the rest of the premises which are now in the possession of the company. He was as a matter of fact joint owner of the whole premises, but his claim is only in respect of his occupation of 115, Waterloo Road, which he has continuously occupied for the whole period, because it was demised to him by the company when the rest of his premises were transferred to the company. There was no break in the occupation, and it makes no difference that the character of the occupation is changed: *Nicholson* v. *Yeoman* (1); or that the amount occupied is diminished: *Smith* v. *Woolston*. (2)

The respondent did not appear.

LORD RUSSELL of KILLOWEN C.J. The special case is so stated that we have to grope in it for the facts; but when they are found they are very simple. Messrs. Gossage & Timmis carried on business at certain premises at Widnes until May, 1894. It is said that they were the joint-owners of those premises, but I think that is not material. They were certainly in occupation of them for more than a year before May, 1894. On May 24 they made over both their business and the premises to a limited company; but Timmis, the present appellant, took a demise from the company of a portion of the premises, which he had used, and which he continued to use, as an office. He continued in occupation of that office down to July 15. The net result of those facts is that the appellant was for the first part of the qualifying year in occupation of the whole of the premises, and that for the remainder of the year he continued in possession of part of them.

The only question is whether that is a sufficient qualification within s. 9 of the Municipal Corporations Act, 1882, which requires that the claimant should be on July 15 in any year, and should have been during the whole of the then last preceding twelve months, in occupation of such a building. The section

(1) 24 Q. B. D. 145. (2) 4 C. P. D. 73.

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seems to me quite clear. I do not think that the change in the character of the occupation effects any break in the occupation itself. I therefore think that the appellant had occupied this office during the whole of the preceding twelve months, and that the decision of the revising barrister was wrong and must be reversed.

My brother Wright has pointed out to me that a similar question has been discussed in the Irish Courts, but it there turned on questions of value which do not arise here. (1)

CHARLES J. I am of the same opinion. I think that there was a continuous occupation of the office 115, Waterloo Road by the appellant during the whole of the qualifying year. No doubt during part of that year he occupied the whole of the premises, but during the remainder of the year he continued to occupy the office; and that amounts in my opinion to a continuous occupation of the office, and is sufficient to satisfy the requirements of s. 9 of the Municipal Corporations Act, 1882.

WRIGHT J. I agree.

Appeal allowed.

Solicitor for appellant: *George J. Lynskey, Liverpool.*

(1) See Lawson's Notes of Decisions in Registration Cases, 1885–1893, pp. 207 et seq.

A. P. P. K.

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May 6.

Margarine —Statutes —Interpretation—Appropriation of Penalties—Implied Repeal—Metropolitan Police Courts Act, 1839 (2 & 3 *Vict. c.* 71), *s.* 47—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 26—*Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 11, 12.

By the Metropolitan Police Courts Act, 1839, s. 47, "Where by any Act or Acts any penalties are or shall hereafter be made recoverable in a summary manner before justices of the peace, and by such Act or Acts the same are or shall be limited and made payable to Her Majesty or to any person whomsoever save the informer who shall sue for the same or any party aggrieved, in every such case the same, if recovered or adjudged before any of the said magistrates (of the metropolitan police), shall be recovered for and adjudged to be paid to the said receiver (of the metropolitan police) for the time being, and not to any other person."

By the Sale of Food and Drugs Act, 1875, s. 20, every penalty imposed by that Act shall be recovered summarily before justices. By s. 26: "Every penalty imposed and recovered under this Act shall be paid in the case of a prosecution by any officer inspector or constable of the authority who shall have appointed an analyst . . . to such officer inspector or constable, and shall be by him paid to the authority for whom he acts, and be applied towards the expenses of executing this Act, any statute to the contrary notwithstanding; but in the case of any other prosecution the same shall be paid and applied according to the law regulating the application of penalties for offences punishable in a summary manner."

By the Margarine Act, 1887, s. 11: "Any part of any penalty recovered under this Act may, if the Court shall so direct, be paid to the person who proceeds for the same, to reimburse him for the legal costs of obtaining the analysis, and any other reasonable expenses to which the Court shall consider him entitled." By s. 12: "All proceedings under this Act shall, save as expressly varied by this Act, be the same as prescribed by sections twelve to twenty-eight inclusive of the Sale of Food and Drugs Act, 1875."

An inspector of an authority who had appointed an analyst, having prosecuted to conviction before a metropolitan police magistrate an offender under the Margarine Act, 1887, the magistrate imposed a penalty, but made no direction as to its application:—

Held, that the application of the penalty was a part of the "proceedings" within the meaning of s. 12 of the Margarine Act, and that the penalty, having been recovered on a prosecution instituted by an officer of the local authority, must be applied as directed by s. 26 of the Sale of Food and Drugs Act, 1875, s. 11 of the Margarine Act notwithstanding; that s. 26 of the Sale of Food and Drugs Act abrogated s. 47 of the Metropolitan Police Courts Act, 1839, so far as it applied to penalties recovered

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on prosecutions instituted by such officers; and that the penalty imposed in the present case was consequently payable to the inspector of the authority and not to the receiver of the metropolitan police.

Wray v. *Ellis* (1 E. & E. 276) doubted and distinguished.

MANDAMUS to clerk of metropolitan police court.

The applicant, Charles Quelch, who is an inspector appointed by the vestry of St. Leonards, Shoreditch, to execute the Sale of Food and Drugs Act, 1875, and the Margarine Act, 1887, within their district, prosecuted one Thomas Morgan before the magistrates sitting at the Worship Street Police Court for an offence under the Margarine Act. The magistrate convicted the offender, and imposed a penalty of 15*l.*, but made no direction as to the application of such penalty. A question having arisen as to whether such penalty was payable to the prosecutor or to the receiver of the metropolitan police, the prosecutor Quelch obtained a rule nisi for a mandamus to Henry Titterton, the chief clerk at the said police court, to whom the penalty had been paid, to pay the penalty to him, the prosecutor.

H. Sutton, for the receiver of the metropolitan police, shewed cause. The receiver of the metropolitan police is entitled to this penalty under s. 47 (1) of the Metropolitan Police Courts Act, 1839, unless that section has been repealed by subsequent legislation. That section provides that in cases of prosecutions for penalties in the metropolitan police courts the penalties, except where sued for by a common informer or party aggrieved, shall go to the receiver and not to any other person. It will be contended on the other side that that section has been impliedly repealed in the case of prosecutions under the Sale of Food and Drugs Act, 1875, by s. 26 of that Act (2), and, secondly, that that implied repeal extends to prosecutions under the Margarine Act, 1887 (2), by virtue of the alleged incorporation of s. 26 of the Act of 1875 in the later Act. Both those contentions are unsound. In the first place s. 47 of the Act of 1839 is still in force. The language of s. 26 of the Act of 1875 applies generally to all Courts throughout the country, whereas

(1) See the section set out in the head-note above.

(2) The provisions referred to are stated in the head-note above.

s. 47 applies only to certain special Courts; s. 47 ought, therefore, to be read into s. 26 as a limitation or proviso upon it in accordance with the canon of construction that generalia specialibus non derogant. This view is strongly supported by the case of *Wray* v. *Ellis*. (1) There a penalty was recovered summarily before a metropolitan police magistrate under the Act for the Suppression of Gaming Houses (17 & 18 Vict. c. 38), by s. 8 of which it was provided that one half of any penalty recovered under that Act should be paid to the informer, and the other half to the overseer of the parish; and it was held by the Court of Queen's Bench that, notwithstanding that provision, s. 47 of the Act of 1839 was still operative, and that the half of the penalty which was not paid to the informer was payable to the receiver of the metropolitan police and not to the overseer. The case of *Attorney-General* v. *Moore* (2), though decided upon different statutes is illustrative of the same principle.

Secondly, if s. 47 of the Act of 1839 is impliedly repealed so far as penalties recovered under the Sale of Food and Drugs Act are concerned, it is not so repealed in the case of penalties recovered under the Margarine Act, 1887, for the provisions of s. 26 of the Act of 1875 are not incorporated in that Act. Sect. 12 of the Act of 1887 incorporates certain sections of the Act of 1875 only so far as they relate to "proceedings," and the application of the penalty recovered is not a "proceeding." That term necessarily imports a step taken or an act done by some person, but the application of the penalty is not dependent upon any such act or step. It is not the magistrate who under s. 26 directs to whom the penalty shall be paid; it is the section itself that applies it automatically. No great weight is to be attached to the fact that s. 12 refers to ss. 12 to 28 of the earlier Act; the draughtsman accidentally omitted to observe that they included s. 26, which does not refer to procedure at all. But even if the application of a penalty is to be regarded as a "proceeding," still ss. 12 to 28 are only to be incorporated "save as expressly varied by this Act," and that must refer directly to s. 11, which is a distinct variation of s. 26. Sect. 11 provides that "the person who proceeds" for a penalty under that Act is

(1) 1 E. & E. 276. (2) 3 Ex. D. 276.

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only to have such part of the penalty as the Court directs. Those words, "the person who proceeds," are perfectly general, and apply to official prosecutors as well as to non-official, for the official prosecutor has, under s. 13 of the Act of 1875, to pay for the analysis just as much as the non-official. But a provision which makes the title of an official prosecutor to the penalty recovered dependent on the discretion of the magistrate is quite inconsistent with a provision which gives him the whole penalty as of right; and s. 11 cannot be read as confined to penalties recovered by non-official prosecutors, for the very same reasoning which, if sound, prevents the reading of s. 47 of the Act of 1839 into the Act of 1875, must equally prevent the reading of s. 26 of the Act of 1875 into the Act of 1887.

Willis, Q.C., and *Macmorran*, in support of the rule. The vestry, whom the prosecutor in this case represents, are burdened by the Sale of Food and Drugs Act, 1875, with the obligation of appointing and paying an analyst and inspector and other officers to execute the Act, and the object of the first part of s. 26 was to enable the vestry to recoup themselves for the expenses to which they are thereby put. Having regard to that object s. 26 would have to be regarded as impliedly repealing s. 47, even if the words "any statute to the contrary notwithstanding" were not there. And the presence of those words makes the case for a repeal all the stronger. Secondly, the provisions of s. 26 are incorporated in the Margarine Act. The application of the penalty is part of the "proceedings." And s. 11 is entirely consistent with s. 26. It was only intended to apply to prosecutions by private persons, the object being to enable the magistrate to reimburse such persons for the expenses to which they had been put in obtaining the analysis, which until then he had no power to do. But even if the section does apply to official prosecutors there is still no inconsistency, for under the one section or the other the official prosecutor will still be entitled to the whole penalty. [They were stopped by the Court.]

LORD RUSSELL of KILLOWEN C.J. The question in this case is whether the applicant, Mr. Quelch, or the receiver of the

metropolitan police is entitled to a penalty imposed by one of the metropolitan police magistrates under the provisions of the Margarine Act, 1887. We are to assume upon the admission of the parties for the purposes of this case, that Mr. Quelch was an inspector of an authority who had appointed an analyst within the meaning of s. 26 of the Sale of Food and Drugs Act, 1875. Now the title put forward on behalf of the receiver of the metropolitan police is founded upon s. 47 of the Metropolitan Police Courts Act, 1839, which provides that where by any Act any penalty is or shall hereafter be recoverable in a summary manner before justices, and by such Act the penalty is payable to Her Majesty, or to any person whomsoever save the informer, who shall sue for the same or the party aggrieved, then in every such case if recovered before any of the metropolitan police magistrates, the penalty is to be paid to the receiver. If the legislation on this subject had rested there the receiver's title to the penalty in the present case would have been clear, but it does not rest there. The question is whether the receiver's title under that statute is displaced in the present case by the provisions of the Sale of Food and Drugs Act, 1875. That Act provides by s. 10 that in the City of London the Commissioners of Sewers, in other parts of the metropolis the vestries and district boards, in every county the court of quarter sessions, and in every borough having a separate court of quarter sessions or a separate police establishment, the town council "may . . . where no appointment has been hitherto made, and in all cases as and when vacancies occur, or when required to do so by the Local Government Board, shall" appoint analysts for their respective districts and pay them such remuneration as may be agreed upon. By s. 12 any member of the public may have any article of food or drug analysed by such analyst on payment of certain fees. By s. 20, when from the certificate of the analysis it appears that an offence has been committed against the Act, proceedings may be taken for a penalty before justices in petty sessions. Then by s. 26, "Every penalty recovered under this Act shall be paid in the case of a prosecution by any officer, inspector, or constable of the authority who shall have appointed the analyst, to such officer, inspector, or constable, and shall be by him paid to the authority

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for whom he acts and be applied towards the expenses of executing this Act, any statute to the contrary notwithstanding." So far that section in clear and unambiguous language provides, in the case of what may be called official prosecutions, that the penalty recovered shall be paid to the authority whom the prosecutor represents. If one is to look at the reason of the thing there seems to be an excellent reason why it should be so. The payment of an analyst is a new burden imposed upon the local authority by the Act, and the portion of s. 26 to which I have referred provides a means by which the local authority may at least in part reimburse themselves. But if that was the object of the section it is difficult to understand why the legislature should have intended to exclude the local authorities of the metropolis from the benefit of provisions which were made applicable to all the other local authorities throughout the kingdom. Then s. 26 goes on to provide that in the case of non-official prosecutions the penalties shall be applied according to the existing law, and by that existing law the penalties when imposed by a metropolitan police magistrate are to go to the receiver of police. That was the state of the law at the time of the passing of the Margarine Act, 1887. And by s. 11 of that Act it was provided that "Any part of any penalty recovered under this Act may, if the Court shall so direct, be paid to the person who proceeds for the same, to reimburse him for the costs of obtaining the analysis and any other reasonable expenses to which the Court shall consider him entitled." The object of that provision was to enable the Court, which till then apparently had no power to award a private prosecutor more than his costs in the police court, to reimburse such private prosecutor for the expense of obtaining the analysis; and, in my judgment, the section must be read as limited in its application to the case of private prosecutors. But further, even assuming that the words "person who proceeds for the same" are wide enough to include an official prosecutor, the result will in any case be precisely the same, and such official prosecutor will get the whole penalty just as much as if s. 11 had never been passed; for as to so much of the penalty as the Court directs to be paid to him he will get it by virtue of the direction, and as to the residue he will get it by

virtue of s. 26. I think, therefore, that there is nothing in the point that s. 11 is inconsistent with s. 26. Nor do I think that there is much weight in Mr. Sutton's other contention that the appropriation of the penalty is not a "proceeding" within the meaning of s. 12, or in other words that the Margarine Act does not incorporate s. 26 of the Act of 1875. I think it very clearly does so incorporate it. It expressly refers to ss. 12 to 28 of the earlier Act, which include s. 26. But apart from that, I cannot regard it as a straining of language to hold that the appropriation of the penalty by the magistrate after he has imposed it is a part of the "proceeding."

But Mr. Sutton has referred us to two cases as authorities in support of his contention that s. 47 of the Act of 1839 is still unrepealed, and holds good in such a case as the present. With regard to those cases I may observe that the language of Lord Campbell C.J. in one of them (*Wray* v. *Ellis*) (1), where he says that "there can be little use in referring to cases where a similar question has arisen on Acts of Parliament differently framed, for they only illustrate the general principle which is not in dispute," seems most apposite to the present discussion. The duty of the Court when called upon to construe an Act of Parliament is, I conceive, to read the Act itself, and if its language is clear to give effect to what the legislature has said. It is to my mind proper to refer to earlier Acts in pari materia only where there is ambiguity. And I can see no ambiguity here. The scheme of the Act of 1875 seems to me perfectly intelligible and coherent; and if one is to look beyond the language itself for justification in reason and principle for what the legislature has said, I think the explanation is in every way complete and satisfactory. The case of *Wray* v. *Ellis* (2) is one by which, if it had been decided upon the same Act of Parliament as that with which we have here to deal, we should undoubtedly be bound, although, speaking for myself, and with the greatest respect for the distinguished judges who decided that case, I confess I should have had great difficulty in arriving at the conclusion at which they there arrived. But I think that the case is distinguishable. It was decided upon a different Act of

(1) 1 E. & E. at p. 288. (2) 1 E. & E. 276.

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Parliament, an Act moreover which did not contain the words "Any statute to the contrary notwithstanding," which are to be found in the Act of 1875. But I lay much less stress upon the presence of those words in the case before us and their absence in the earlier case, than I do on the careful alternative provisions which are made in s. 26 according as the prosecution is instituted by an official prosecutor or by a private person. I do not think it necessary to refer to the case of *Attorney-General* v. *Moore* (1) beyond saying that grounds for distinguishing *Wray* v. *Ellis* (2) apply equally to that case.

I am of opinion, therefore, that the receiver of the metropolitan police is not entitled to the penalty in question. The rule for the mandamus will therefore be made absolute.

CHARLES J. I am of the same opinion. The first question we have to decide is whether s. 26 of the Sale of Food and Drugs Act, 1875, is incorporated in the Margarine Act. It has been contended that it is not, and upon two grounds. In the first place it was said that s. 12 of the Margarine Act incorporated certain sections of the earlier Act only so far as they related to "proceedings," and it was said that the appropriation of a penalty was not a "proceeding." Secondly, it was said that s. 12 must be read along with s. 11, and that the provision in s. 11 that the Court might direct that a part of the penalty should be paid to the prosecutor was inconsistent with the prosecutor having in any case a right to the whole penalty. I am unable to assent to either of those contentions. I think that the application of a penalty is a "proceeding" within the meaning of s. 12, the more so as s. 26 of the earlier Act which prescribes the application is one of a group of sections which are expressly referred to in s. 12. And secondly, I cannot see that to hold s. 26 of the earlier Act to be incorporated in the later Act is inconsistent with a fair interpretation of s. 11 of the later Act. Sect. 26 gave the penalty to the officer of the authority only in certain special cases, namely, where the prosecution was instituted by such officer, and left the application of the penalty in the case of non-official prosecutions to the general law. It was

(1) 3 Ex. D. 276. (2) 1 E. & E. 276.

because under the general law there was no power of reimbursing a private prosecutor for his expenses in obtaining an analysis that s. 11 was passed, and I think that it was to private prosecutions alone that s. 11 was intended to apply. But even if that section does apply also to official prosecutions, there is no inconsistency between it and s. 26. I am of opinion, therefore, that s. 26 of the Act of 1875 is incorporated in the Margarine Act, and it accordingly becomes necessary to consider the question whether s. 26, to any and what extent, repeals s. 47 of the Metropolitan Police Courts Act, 1839. Reading s. 26 by itself, and without laying any stress on the words "Any statute to the contrary notwithstanding," I cannot regard it as otherwise than a plain enactment that in all official prosecutions under that Act the penalties shall be paid to the prosecutor, and I quite agree with what my Lord has said as to the reason of the thing, and the propriety of providing a means by which the local authority should reimburse themselves for the expenses of executing the Act. But it is said that that section is of general application, and applies to all official prosecutions throughout the country in whatever courts they may be instituted, whereas s. 47 of the Act of 1839 applies only to prosecutions within a very limited area and in certain specified courts within that area, namely to prosecutions in the metropolitan police courts, and it is said that the maxim "Generalia specialibus non derogant" applies. I think, however, that an examination of the purview and language of the Act of 1875 compels one to the conclusion that s. 26 was intended to be of universal application, and that s. 47 of the earlier Act must be regarded as impliedly repealed. I should have had no hesitation whatever in coming to that conclusion had it not been for the case of *Wray* v. *Ellis* (1), which for a time certainly presented great difficulty to my mind. I confess I am unable to appreciate the reasons which guided the Court of Queen's Bench to their decision in that case. But there the decision stands, and if this were a case of the application of a penalty under the Act for the Suppression of Gaming Houses we should be bound by it. I cannot, however, regard it as any authority for the general proposition for which it is cited in Chitty's Statutes,

(1) 1 E. & E. 276.

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4th ed., vol. iv. 1402, that "This section (s. 47) is not repealed so far as regards the application of penalties," irrespective of the statute under which the penalties are imposed. As the conviction in the present case was under a different statute the case of *Wray* v. *Ellis* (1) does not bind us. The rule for a mandamus must be made absolute.

Rule absolute.

Solicitor for the applicant: *H. Mansfield Robinson.*

Solicitor for the clerk of the police court: *Solicitor to the Treasury.*

J. F. C.

1895

May 6, 23.

O'NEIL *v.* ARMSTRONG, MITCHELL & CO.

Ship—Seaman—Contract of Service—Ordinary Voyage—Increased Danger—Uncompleted Voyage—Right to Wages.

The Japanese Government purchased in this country a war-ship, which they placed in charge of a master to navigate on their behalf from the Tyne to Yokohama. The plaintiff contracted with the master to serve as one of the crew for the voyage for a fixed sum. The ship sailed from the Tyne, but before she arrived at her destination news reached her that war had been declared by Japan against China. The plaintiff thereupon refused to continue to serve, and left the ship. In an action brought by the plaintiff for his wages:—

Held, that the master was responsible to the plaintiff for the act of his principals in declaring war, and that, as the consequence of such declaration of war would be to expose the plaintiff, in the event of his continuing the voyage, to greater risks than those he had contracted to run, the plaintiff was justified in abandoning the voyage, and was entitled to recover the stipulated sum notwithstanding that the voyage was not completed.

APPEAL from the judge of the county court of Northumberland sitting in Admiralty.

The defendants built for the Japanese Government a torpedo vessel called the *Tatsuta*, which they duly delivered in the Tyne to one Captain Robert Strannach, as agent for the said government, in July, 1894. Captain Strannach was employed by the said government to navigate the vessel from the Tyne to Yokohama, and for that voyage he engaged a crew, of

(1) 1 E. & E. 276.

whom the plaintiff was one. The plaintiff was engaged as fireman for a fixed sum of 30*l.*, of which 8*l.* was to be payable five days after sailing and the remainder on the completion of the voyage. At the time the plaintiff signed the muster-roll Japan was at peace, nor did the plaintiff know that war between Japan and China was imminent. The *Tatsuta* sailed on July 31, and on August 3 war was declared by Japan against China. Upon the *Tatsuta* reaching Aden she was boarded by the captain of a Queen's ship, who read the proclamation of neutrality under the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), and called the attention of the crew to the penalties attaching to breaches of that Act on the part of British seamen. The governor of Aden also warned them of the risks they would run if they continued the voyage. Thereupon the plaintiff and sixteen other members of the crew refused to continue the voyage and left the ship, and the governor provided them with the money for their passage home. The plaintiff, who had been paid the sum of 8*l.*, part of his wages, then brought this action against the defendants to recover the sum of 22*l.* balance of the stipulated wages, and damages for anxiety and for the loss he sustained in being obliged to quit the ship at a place where he was unable to get an engagement for a return voyage home. The defendants accepted responsibility for the satisfaction of the plaintiff's claim if, and to the extent to which, Captain Strannach was liable to the plaintiff, and the action proceeded as though Captain Strannach was the defendant. The county court judge gave judgment for the plaintiff for the 22*l.* balance of the wages and 10*l.* for general damages. The defendants appealed.

A. Lyttelton, for the defendants. The general rule is that when a person contracts to do an entire work for a sum certain he cannot recover anything until the whole work be done. A seaman who is hired for a voyage for a fixed sum is entitled to no part of that sum until the voyage is completed: *Cutter* v. *Powell*. (1) If after the work has been partly performed, inevitable accident or the act of a superior power renders its further performance impossible, both parties are discharged from their obligations, and the loss must lie where it falls: *Appleby* v.

(1) 6 T. R. 320.

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Myers. (1) No doubt if the impossibility of completing the voyage had been due to the fault of Captain Strannach, the plaintiff would be entitled to his whole wages: *Burton* v. *Pinkerton*. (2) But it was not. It was due to the act of the Japanese Government in declaring war; and they were a superior power over whom Captain Strannach had no control and for whom he cannot be held responsible. The contract of hiring of a seaman contains no implied warranty that the voyage shall be a peaceful one.

Sir W. Phillimore, Q.C. (*S. T. Evans* with him), for the plaintiff. The further prosecution of the voyage was rendered impossible by the declaration of war, for the ship was a war-ship, and the plaintiff, a British seaman, would, if he had continued to serve on board her, been liable to the penalties of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90). For to bring a case within that Act it is not necessary that the service should be a directly warlike service. Thus, in *The Gauntlet* (3), the use of a British tug for the purpose of towing a French prize into a French port during the Franco-Prussian war was held within the Act. Then, for the act of his owners in so declaring war, Captain Strannach was responsible to his crew, and the impossibility of the continuance of the voyage may be regarded as due to his fault. But even if that be not so, still there was contained in the contract of hiring an implied warranty that the voyage should not be an illegal one. Such a warranty is implied in a policy of marine insurance, and should equally be implied here. In any case, the plaintiff is entitled to recover on a quantum meruit for the portion of the voyage performed. In *Clay* v. *Yates* (4), where the plaintiff, a printer, agreed to print for the defendant a book which was to contain a dedication to be thereafter sent, and having printed the book found the dedication to be libellous, it was held that he was justified in refusing to complete the work, and was entitled to recover the cost of the work done.

With regard to the 10*l.* for general damages, the Admiralty Court has jurisdiction to award such damages: *The Justitia*. (5)

Lyttelton, in reply.

(1) L. R. 2 C. P. 651.
(2) L. R. 2 Ex. 340.
(3) L. R. 4 P. C. 184.
(4) 1 H. & N. 73; 25 L. J. (Ex.) 237.
(5) 12 P. D. 145.

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May 23. The judgment of the Court (Lord Russell of Killowen C.J. and Charles J.) was read by

CHARLES J. This was an action for wages and damages brought by the plaintiff, who was one of the crew of a torpedo gunboat called the *Tatsuta*, against the defendants in the county court at Newcastle-upon-Tyne. The learned judge gave judgment for the plaintiff for a sum of 32*l.*, made up of 22*l.* for wages and 10*l.* for damages. The defendants appealed, on the ground that the judge was wrong in law in holding that either wages or damages were recoverable.

The *Tatsuta* was constructed by the defendants at Newcastle for the government of Japan, and we think it must be taken, although there is no direct evidence upon the point, that upon completion she became the property of the Japanese Government. When ready to sail she was placed by the defendants in charge of Captain Robert William Strannach, whose duty it was to navigate her to Yokohama, and there deliver her to the Japanese authorities. The exact position, however, of the captain was not clearly proved, and although the judge in his judgment describes him as the agent, representative, and servant of the Japanese Government, we were informed that no admission of the accuracy of this description was made by the defendants at the trial. But we think enough was established as to his relation to that government to render further inquiry unnecessary. On July 30 the plaintiff signed the ship's muster-roll, from which it appeared that he agreed with the captain to proceed as fireman in the vessel from the Tyne to Yokohama for a sum of 30*l.*, of which 8*l.* was payable five days after sailing, the remainder being payable at the conclusion of the run. The vessel left the Tyne on July 31, carrying the Japanese flag, at a time when the governments of China and Japan were at peace, and when neither plaintiff nor defendants were aware that war was imminent between the two countries. As far, at all events, as the plaintiff was concerned, all he knew was that the vessel was a torpedo boat bound to Yokohama. He stated that he did not even notice her flag. On August 3 war was declared, and the plaintiff first heard of the declaration on reaching Gibraltar. At Port Said the captain of a British gunboat boarded the *Tatsuta*,

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and made a communication to Captain Strannach. The latter, however, said nothing to the crew, and the vessel proceeded to Aden, where she arrived on August 23. Upon her arrival, Captain Fisher of H.M.S. *Cossack* came on board, and read the proclamation of neutrality, at the same time warning the crew of the risk to their own safety they would run if they continued the voyage, and of the probability that by going on they would become liable to punishment under the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90). The plaintiff and others of the crew afterwards consulted the governor of Aden, who also advised them of the dangers they might encounter. In the result, the plaintiff and sixteen other members of the crew resolved to cease serving on the ship. They came ashore with their baggage, and were subsequently provided by the governor with a passage home. It may here be added that in a notice to leave the port given to the captain by the authorities at Aden the ship is treated as a Japanese vessel of war.

The plaintiff's case was taken as a test case, the decision of which was to determine the defendants' liability to the rest of the crew, as well as to the plaintiff; and the question we have to consider is, What under the circumstances are his rights to wages or damages, or to both? The defendants admitted before and at the trial that they would "accept responsibility for payment of the wages if under the contract Captain Strannach would be liable to pay them," and, further, would accept responsibility "for all acts done by him within the scope of his authority." The matter, therefore, must be regarded as though Captain Strannach were the defendant in this action.

It was contended by the defendants that the principle of *Cutter* v. *Powell* (1) was applicable, and that the plaintiff, not having completed the whole voyage, could not recover either on the contract or on a quantum meruit. Whilst the defendants' counsel admitted that the change in the character of the voyage, on the one hand, justified the plaintiff in declining to proceed, he insisted, on the other hand, that the defendants were relieved from the liability to pay him the agreed wages, which were only due in case he had performed the whole voyage, and that they

(1) 6 T. R. 320.

were not liable in damages. Further, it was argued that the plaintiff was not even entitled to his wages as far as the port of Aden, because there could, under the circumstances, be no fresh contract implied between the parties to pay for the part of the voyage performed. The case was said to be analogous to *Appleby* v. *Myers* (1), where the plaintiffs had agreed with the defendant to erect machinery on his premises at a certain price. Part of the work was done; but, before completion, the premises were burnt down through no fault of the defendant. The Court of Exchequer Chamber held that this was "a misfortune equally affecting both parties, excusing further performance by either, but giving a claim to neither." Now here, the defendants urged that the declaration of war was a misfortune of a similar character —something done which was beyond the control either of the plaintiff or the defendants. It is, however, to be noted, in the first place, that in that case the defendant had received no benefit from the incomplete work, and, in the next place, it is obvious that if the defendants or the captain, for whom they accepted responsibility, were in this case in any way to be held responsible for the declaration of war by the Japanese Government, the authority cited has no application. If the captain was navigating the vessel, as master, for her owners, the Japanese Government, then there was a responsibility resting upon him as agent for the owners in reference to the change in the character of the adventure, and the case would not be at all analogous to the cases where the performance of a contract has become impossible or illegal by the occurrence of an event beyond the control of either party to it. It would rather be analogous to a case where performance of a contract was prevented by the act of the defendant, and where an action could undoubtedly be maintained for a breach of contract by a plaintiff who had been prevented from earning what would have become due to him had the contract been carried out, and where the damages would primâ facie be the amount of money he would have earned. The principle which governs each class of case is thus stated by Blackburn J. in *Appleby* v. *Myers* (2): "The plaintiffs," he says, "having contracted to do an entire work for a specific sum can

(1) L. R. 2 C. P. 651. (2) L. R. 2 C. P. at p. 661.

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recover nothing unless the work be done, *or* it can be shewn that it was the defendant's fault that the work was incomplete, *or* that there is something to justify the conclusion that the parties have entered into a fresh contract." Now here, we think that it was the owners' fault that the voyage was not completed. They declared war, and thus entirely altered the character and conditions of the voyage on which the plaintiffs had embarked; and, having regard to the defendants' admissions, we are of opinion that they are precluded from treating the declaration of war as an act done by an independent superior authority. They have admitted responsibility for the master of a Japanese vessel of war, and if his owners have taken a step during the continuance of his contract with the plaintiff which has exposed the plaintiff to dangers greater and other than those originally anticipated, he must, in our judgment, be held liable to the plaintiff to pay the wages which, but for the owners' act, would have been duly earned. This conclusion is entirely consistent and in accordance with the decision of the Court of Exchequer in *Burton* v. *Pinkerton* (1), a case in many respects similar to the present. There the plaintiff agreed with the defendant to serve as one of the crew of a ship whereof the defendant was master for twelve months from London to Rio and back. The ship was destined for the service of the Peruvian Government, and had on board a cargo of coals and ammunition. On her voyage she joined two Peruvian war steamers, to which she from time to time supplied arms and ammunition. At Rio the plaintiff and defendant became aware that hostilities had broken out between Spain and Peru, two powers at peace with England. The defendant, notwithstanding this circumstance, announced to the plaintiff that he intended to go on to Callao, another Peruvian port. He was at that time acting under the directions of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. The plaintiff objected to serve any further on the voyage on the ground that it had become illegal, and involved greater danger than he had anticipated when he entered into his agreement. He accordingly left the ship. The Court of Exchequer held that the defendant

(1) L. R. 2 Ex. 340.

must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate. In the present case, as in *Burton* v. *Pinkerton* (1), the captain's action in going on with the voyage after war had broken out certainly increased the risk incidental to an ordinary voyage, and (apart from any question of illegality under the Foreign Enlistment Act, 1870, which it is unnecessary to decide) entitled the plaintiff to treat his conduct as a breach.

We may add that, in our opinion, the defendants would have been liable to pay the plaintiff his wages up to the port of Aden, even if the declaration of war had been by a power for whose acts they had in no way made themselves responsible. The case would then, we think, have fallen under the third class mentioned by Blackburn J. in *Appleby* v. *Myers*. (2) It would have been one in which from the conduct of the parties the conclusion might properly be drawn that they had entered into a fresh contract whereby the captain became liable to pay for the part of the voyage which had actually been performed. He took the benefit of part performance, and there is evidence that at Aden he treated the run as at an end. Both sides seem to have regarded the original contract as one which could no longer be acted upon; and, that being so, we see no reason why for the work actually done the plaintiff could not have sued on a quantum meruit.

With regard to general damages, there seems no doubt that they are recoverable. The county court judge acted upon the case of *The Justitia* (3), where general damages were awarded to a seaman for hardships and risks incurred by him through the vessel being employed for purposes other than those contemplated by the agreement. We see no reason to differ from him upon this subsidiary point. It may be also observed that in *Burton* v. *Pinkerton* (1), although the majority of the Court thought the special damages claimed too remote, the Court was unanimously of opinion (4) that the plaintiff was entitled to

(1) L. R. 2 Ex. 340.
(2) L. R. 2 C. P. 651.
(3) 12 P. D. 145.
(4) L. R. 2 Ex. at p. 349.

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recover in addition to his wages something under the head of general damage for some of the inconveniences and annoyances he had suffered.

In the result, we think that the judgment of the Court below was right, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *P. G. Robinson, for Smith, Newcastle-on-Tyne.*

Solicitors for defendants: *Crossman & Pritchard, for Dees & Thompson, Newcastle-on-Tyne.*

J. F. C.

1895
May 16.

ROBINS & CO. *v.* GRAY.

Innkeeper—Lien—Goods of Third Person.

A commercial traveller who travelled for the plaintiffs went in the course of their business to stay as a guest at the defendant's inn. While he was there the plaintiffs sent to him certain parcels of goods for sale in the district, which goods the defendant at the time they were received into the inn knew to be the goods of the plaintiffs, and not of the traveller. Subsequently the traveller failed to pay for his board and lodging in the inn:—

Held, that the defendant had a lien upon the goods in respect of the debt.

ACTION tried before Wills J. without a jury.

The plaintiffs were a firm of dealers in sewing-machines and other articles, and in 1894 they had in their employment one Edward Green as a commercial traveller, who canvassed for orders and sold their goods upon commission. In April, 1894, Green went to stay for the purposes of his business as such traveller at the defendant's hotel, and remained there until the end of July. While he was there the plaintiffs sent to him from time to time certain sewing-machines, watches, chains, and musical albums, which it was in the ordinary course of his business to have at the inn for the purpose of selling them to customers in the district. At the end of July Green was in the defendant's debt for board and lodging to the amount of 4*l.* 0*s.* 8*d.*, which sum he neglected to pay. The defendant

claimed a lien in respect of this debt upon certain of the goods which had been so sent by the plaintiffs to Green, and detained them accordingly. Before the goods in question had been received into the hotel, or the said debt had been incurred, the defendant had been expressly informed by the plaintiffs that the goods were the plaintiffs' property, and not the property of Green. The plaintiffs brought detinue.

Arthur Powell, and *Guy Granet*, for the plaintiffs. The defendant having received the goods into the inn with the knowledge that they were the property, not of his guest, but of a third person, cannot be allowed to set up a claim of lien upon them. This is established by the case of *Broadwood* v. *Granara*. (1) There a piano was lent by the plaintiffs to a person who was staying as a guest at an inn, the innkeeper well knowing that the piano was the property of the plaintiffs, and it was held that the innkeeper had no lien on it for the bill due from his guest. On the other hand, in *Threlfall* v. *Borwick* (2), where a guest took with him to an inn a piano, which the innkeeper believed to be the property of the guest, but which in fact belonged to a third person, it was held that the innkeeper had a lien on it. A comparison of those two cases shews that the test of the existence of a lien on the goods of a third party is, whether the innkeeper knew they were not the property of the guest. So in *Gordon* v. *Silber* (3), where a husband and wife having brought luggage with them to an hotel the hotel-keeper was held to have a lien upon the whole of the luggage, although part of it was the separate property of the wife, and credit had been given to the husband alone, the judgment proceeded upon the ground that the hotel-keeper had no means of knowing that part of the luggage was the property of the wife.

W. E. Hume Williams, for the defendant. The lien of an innkeeper is given to him as a compensation for the obligation which the law imposes on him to receive the goods which a guest brings with him, or has sent to him at the inn, and to keep them securely; and that obligation extends even to goods which, to

(1) 10 Ex. 417. (2) L. R. 10 Q. B. 210.
(3) 25 Q. B. D. 491.

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the knowledge of the innkeeper, are not the guest's property, if they are of a description which any class of guests ordinarily carry about with them. It could not be contended that an innkeeper is not bound to receive the goods with which a commercial traveller ordinarily travels; yet in the majority of cases he must know perfectly well from the mere appearance of the packages that the contents are not the property of the guest, but of the manufacturer for whom he travels. Being bound to receive them, he has a lien. If it were held otherwise, the keepers of all commercial inns throughout the country would lose their principal security for the due payment of the bills of the majority of their guests.

WILLS J. The law applicable to this case is, I think, clear. The defendant no doubt knew, at the time that Green's debt to him was incurred, that the goods upon which he now claims to have a lien were the goods, not of Green, but of his principals. But that fact is, in my opinion, immaterial. The goods in question were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the regular apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while they were there. Here it is true that the goods were not brought by Green to the inn—they were sent to him while he was staying there. But that can make no difference. The defendant was bound to receive them and take care of them, as a part of his duty towards his guest. It follows that the lien attached to them. Knowledge on the part of the innkeeper that the goods brought by, or sent to, the guest are not the guest's property, is in my judgment material only where the goods are of a description which the innkeeper is not bound to receive, such as the piano in the case relied on by the plaintiff.

Judgment for the defendant.

Solicitor for plaintiffs: *W. Wilkins.*

Solicitors for defendant: *Collyer-Bristow & Russell, for F. Hall, Folkestone.*

J. F. C.

McHARG v. UNIVERSAL STOCK EXCHANGE, LIMITED.

1895
May 3.

Practice—Chambers—Appeal—"Practice and Procedure"—Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1, sub-s. 4.

A summons asking for an interim injunction until the trial of the action is a "matter of practice and procedure" within the meaning of s. 1, sub-s. 4, of the Judicature Act, 1894, and the appeal from the order of a judge at chambers on such a summons is to the Court of Appeal, and not to the Divisional Court.

APPEAL from chambers.

The writ in the action claimed an injunction to restrain the defendants from proceeding with an arbitration in accordance with the terms of a notice given by them to the plaintiff. After service of the writ the plaintiff took out a summons asking for an interim injunction until the trial of the action. Day J. at chambers refused the application and made no order upon the summons. The plaintiff appealed.

Pollard, for the defendants, took the preliminary objection that the appeal should have been brought to the Court of Appeal.

Stutfield, for the plaintiff. The appeal is properly brought to the Divisional Court; it is not an appeal in a matter of practice or procedure within the meaning of s. 1, sub-s. 4, of the Judicature Act, 1894. (1) The summons asks for that which is the main object of the action, and practically this hearing of the summons will be the trial of the action. An order made upon the summons would be an interlocutory order determining, at

(1) By the Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1, sub-s. 4, "In matters of practice and procedure every appeal from a judge shall be to the Court of Appeal."

By sub-s. 5, "In all cases where there is a right of appeal to the High Court from any Court or person, the appeal shall be heard and determined by a Divisional Court . . . ."

By sub-s. 1 (*b*) (ii.), the case of granting or refusing an injunction is excepted from the provision requiring leave to appeal from interlocutory orders made by a judge.

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least for a considerable time, the rights of the parties, and cannot be treated as a mere matter of practice or procedure. There is an absolute right of appeal in this case, the granting or refusing of injunctions being expressly excepted by sub-s. 1 (*b*) (ii.) from the provision requiring leave to appeal from interlocutory orders made by a judge; and, there being an unqualified right of appeal, the case falls within sub-s. 5, which applies in terms to "all cases" where there is such a right, whether matters of practice and procedure or not. The fair construction of the section is that, certain absolute rights of appeal without leave having been preserved, the tribunal has been preserved to which the appeals were brought.

Pollard, who was not called upon to argue, intimated that the defendants would not consent to treat the hearing of the summons as the trial of the action.

CHARLES J. I am of opinion that this appeal should have been brought to the Court of Appeal, and not to the Divisional Court. It is contended for the appellant that this is not an appeal in a matter of practice or procedure withing the meaning of s. 1, sub-s. 4, of the Judicature Act, 1894; but I think it is such an appeal, and on these grounds. The action is an action for an injunction, and the order sought by the appellant is an interlocutory order in that action; it is not in any sense a final order unless it is so treated by consent of the parties, and there is no such consent in the present case. It seems, therefore, that this summons was simply a step in the cause, a part of the machinery by which the action was to be worked out to its final determination. I am quite unable to see why such a summons should not be a matter of practice and procedure. I am far from saying that all interlocutory applications are matters of practice and procedure: they certainly are not; but in my judgment such an application as the present clearly is.

Another argument was urged on behalf of the appellant founded on sub-s. 5, which provides that in all cases where there is a right of appeal to the High Court from any Court or person the appeal shall be to a Divisional Court. This is clearly a case where there is a right of appeal to the High Court, for the case

of granting or refusing an injunction is excepted in the earlier part of the section from the provision requiring leave to appeal from the interlocutory order of a judge; and it is argued that, as sub-s. 5 applies to "all cases," whether matters of practice and procedure or not, the appeal in cases where there is an absolute right of appeal lies to a Divisional Court. I cannot accede to that argument. I greatly doubt whether sub-s. 5 applies to an order of a judge of the High Court at all; the language is appropriate rather to an appeal to the High Court from another Court, it might be an inferior Court. It is true that the word "person" is used; but we cannot infer from the use of that word, which would be satisfied by interpreting it as meaning an arbitrator or referee, that the sub-section means to say "Court or judge or person." I have come, therefore, to the conclusion that this case is within sub-s. 4, the application of which is not cut down by the provisions of sub-s. 5, and that consequently we have no jurisdiction to entertain this appeal.

Wright J. I am of the same opinion for the same reasons.

Appeal dismissed.

Solicitor for plaintiff: *J. Banks Pittman.*
Solicitors for defendants: *Last & Sons.*

W. J. B.

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May 16.

[IN THE COURT OF APPEAL.]

GWILLIAM *v.* TWIST AND ANOTHER.

Master and Servant—Extent of Servant's Authority—Sudden Emergency—Implied Authority to employ Substitute—Agent of necessity.

While the defendants' omnibus was being driven by the defendants' servant, a policeman, thinking that the driver was drunk, ordered him to discontinue driving, the omnibus being then only a quarter of a mile from the defendants' yard. The driver and the conductor of the omnibus thereupon authorized a person who happened to be standing by to drive the omnibus home. That person through his negligence while so driving the omnibus home injured the plaintiff:—

Held, reversing the judgment of a Divisional Court, that, as the defendants might have been communicated with, there was no necessity for their servants to employ another person to drive the omnibus home, and the defendants were not liable for the negligence of the person so employed.

Query, whether, if there had been such a necessity, the defendants would have been liable.

APPEAL from the judgment of a Divisional Court (Lawrance and Wright JJ.) on an appeal from the county court of Birmingham. (1)

The action was for damages for personal injuries.

The defendants were the proprietors of an omnibus which was being driven through the streets of Birmingham by a driver in the employment of the defendants named Harrison. A police inspector, being of opinion that Harrison was not sober and could not drive the omnibus with safety, ordered him to discontinue driving it and get down, which he did. The omnibus was at that time about a quarter of a mile from the defendants' yard. A man named Veares, who had formerly been a conductor in the defendants' employment, and who happened to be standing by, volunteered to drive, and did drive the omnibus home to the defendants' yard. While on the way there he drove over and injured the plaintiff, who was a passenger in the street. There was a conflict of evidence as to whether the police inspector ordered Veares to drive the omnibus home, or Harrison employed him to do so. The county court judge

(1) [1895] 1 Q. B. 557.

found as follows: that the accident was caused by the negligent or unskilful driving of Veares; that the police inspector did not order Veares to drive the omnibus home, but the driver and conductor acquiesced in his doing so; and that, as to the driver being the worse for drink, it was not necessary to give an opinion, but the inspector honestly thought that he was not in a fit state to drive, and acted properly in telling him to discontinue driving. The county court judge on these findings gave judgment for the plaintiff for 30*l.* damages. He said, in giving judgment, that the driver Harrison and the conductor, having acquiesced in Veares' driving, must be taken to have authorized his driving on behalf of the defendants; that, as it was clearly necessary that some one should drive the omnibus back to the yard, it was under the circumstances within the scope of their authority to authorize Veares to drive; and that the defendants were therefore liable for Veares' negligence.

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The defendants appealed against the judgment of the county court judge.

The Divisional Court dismissed their appeal.

Edward Pollock, for the defendants. The defendants are not responsible for the negligence of a person who was not their servant. Assuming that, in the case of an absolute necessity for the delegation of his duty by a servant, the person employed by him would become the servant of the master, so as to render him responsible for the acts of such person, no such necessity existed in the present case. The county court judge does not expressly find as a fact that it did; and, if it must be taken that he did so, there was no evidence upon which he could so find. The omnibus was only a quarter of a mile from the defendants' yard, and there was nothing to prevent their being communicated with and some servant of theirs being sent to drive the omnibus home. [He cited *Hawtayne* v. *Bourne*. (1)]

Boydell Houghton, for the plaintiff. In the case of an emergency such as occurred here, the law will imply an authority on the part of the servant to employ some one to perform his duty. The necessity for the servant to delegate his duty need not be

(1) 7 M. & W. 595.

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absolute. It is sufficient if under the circumstances it is the reasonable course for him to do so. It is submitted that the terms of the county court judge's judgment clearly shew that he was of opinion that such a necessity existed, and there was evidence on which he might reasonably so find.

[LORD ESHER M.R. The doctrine of authority by necessity in the case of the master of a ship only applies where he cannot communicate with the owner. In this case the defendants' yard was only a quarter of a mile away.]

The omnibus and horses were then obstructing the public street, and something had to be done with them immediately. [He cited *Nicholson* v. *Chapman* (1); *Lynch* v. *Nurdin* (2); *Booth* v. *Mister* (3); Story on Agency, s. 142.]

LORD ESHER M.R. In this case a question of great importance has been raised, which, however, it is not necessary for us to decide, namely, whether, if there were a necessity for a servant to delegate his duty to another person, that delegation would make that other person a servant of the master so as to render the latter responsible for his acts. It seems to me perfectly clear that a servant employed for a particular purpose can have no authority to delegate the performance of his duty to another person, unless there is a necessity for so doing. The question therefore arises whether there was in this case any evidence upon which the county court judge could reasonably find that there was a necessity to delegate the duty of driving the omnibus to Veares. I doubt whether the learned county court judge has in truth found that there was any such necessity; for he appears to have made certain specific findings of fact, among which there is no finding that there was such a necessity, and then in his judgment he subsequently seems to have treated the case upon those findings of fact as being one of necessity: but I will assume that he intended to find that there was in fact such a necessity. The question is whether there was evidence to support that finding. Was there any necessity for the delegation of the duty of driving the omnibus to Veares without consulting

(1) 2 H. Bl. 254. (2) 1 Q. B. 29.
(3) 7 C. & P. 66.

the employers? If there is an opportunity to consult the master on the subject, I do not see how it can be necessary that the servant should act on his own view. Here there was an omnibus in the street, and the driver became incapacitated for driving it by reason of an order given by a policeman which he was bound to obey. It was only a quarter of a mile from the yard where the owners of the omnibus carry on business. I cannot see anything to shew that the omnibus might not have safely remained where it was while the conductor or some other messenger went to the owners' yard to inform them what had happened, and to ask what was to be done. If that were so, I think the judge would be bound to direct a jury, if there were one, or, if trying the case without a jury, would be bound to find himself, that it had not been made out that there was any necessity for the servant to delegate his duty to another person without communicating with his master. There being no evidence on which the judge was entitled to say that such a necessity had arisen, he was bound, I think, to hold that the servant had no authority to delegate his duty to another person, and that consequently the defendants could not be made responsible for the negligence of that other person. For these reasons I think the appeal must be allowed.

I am very much inclined to agree with the view taken by Eyre C.J. in the case of *Nicholson* v. *Chapman* (1), and by Parke B. in the case of *Hawtayne* v. *Bourne* (2), to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for the honour of the drawer.

A. L. SMITH L.J. In this case the defendants sent out an omnibus with Harrison as the driver of it. An inspector of police ordered Harrison to desist from driving, which he accordingly did, and thereupon Harrison authorized a man named Veares, who had formerly been in the defendants' employ as a conductor, and who happened to be standing upon the pavement, to drive the omnibus home. In the course of so doing he through his negligence injured the plaintiff, and the question is

(1) 2 H. Bl. 254. (2) 7 M. & W. 595.

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whether under these circumstances the defendants are liable for the negligent act of Veares. Ordinarily a master is not responsible for injuries arising from an act of a servant when done not within the scope of his employment. The question is whether under the circumstances of this case it was within the scope of Harrison's employment to put up Veares to drive the omnibus as he did. If it was not, his employers are not liable. It is clear that it is not primâ facie within the scope of a coachman's employment to delegate the duty of driving to other persons. But it was argued that circumstances might exist which would constitute the coachman an agent of necessity on behalf of his master to employ some one else to drive, and that under such circumstances he would have authority to do so. To constitute a person an agent of necessity he must be unable to communicate with his employer; he cannot be such an agent if he is in a position to do so. The impossibility of communicating with the principal is the foundation of the doctrine of an agent of necessity. I adopt the passage in Carver's Carriage of Goods by Sea, s. 299, where he says, in relation to the sale of cargo by the master of a ship as being an agent of necessity: "If there is a fair expectation of obtaining directions, either from the owners of the goods or from agents known by the master to have authority to deal with the goods, within such time as would not be imprudent, the master must make every reasonable endeavour to get those directions, and his authority to sell does not arise until he has failed to get them." The county court judge in stating his findings of fact in the first instance did not specifically find that there was a necessity for the delegation of the duty of driving the omnibus to Veares. It is true that in subsequently giving judgment he says that it was necessary that some one should drive the omnibus home, but he does not seem to me to have applied his mind to the question as to what constitutes an agent of necessity. The mere fact that somebody must drive the omnibus home, which is obvious, does not constitute the driver an agent of necessity to employ Veares to do so; and I think that on the facts proved there is no evidence that he was such an agent. When the driver was ordered to desist from driving by the policeman, the omnibus was only a quarter

of a mile from the defendants' yard, and there was an obvious possibility of communicating with the employers and by a reasonable endeavour obtaining their directions as to what was to be done. It seems to me, therefore, that there was no evidence to shew that Harrison was an agent of necessity so as to justify the putting up Veares to drive the omnibus, and therefore, it not being within the scope of his employment to do so, the defendants are not responsible for Veares' negligence.

RIGBY L.J. I am of the same opinion. The county court judge appears to have found certain facts and then delivered his judgment on the question of law. I should be inclined to say that he deduced the existence of the necessity for employing Veares to drive the omnibus home from those facts rather than found the existence of that necessity as an independent fact; but, assuming that he intended to find it as a fact, I should say that there was no evidence of any such necessity so as to give authority for the delegation by Harrison of his duty as driver. None of the decisions point to the existence of such an authority, unless there be a necessity for it. I am therefore of opinion that this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *W. E. Aldis, for H. Parry, Birmingham.*
Solicitors for defendants: *T. A. Dennison & Co., for Tanner, Birmingham.*

E. L.

C. A.
1895
May 17.

[IN THE COURT OF APPEAL.]

In re An Arbitration between JAMIESON and THE NEWCASTLE STEAMSHIP FREIGHT INSURANCE ASSOCIATION.

Insurance (Marine) — Loss of Freight — "Cancelling of Charter" — Delay through Perils of the Sea—Frustration of Adventure.

A policy of insurance upon freight contained the provision "no claim arising from the cancelling of any charter shall be allowed." The vessel on her way to the port of loading under a charterparty was so delayed by perils of the sea that the voyage contemplated by the charter became impossible; but no agreement to set aside the charter was made by the parties:—

Held, reversing the judgment of a Divisional Court, that the charter had not been cancelled within the meaning of the provision, and that the assured was entitled to recover upon the policy.

Appeal from the judgment of a Divisional Court (Charles and Kennedy JJ.) upon an award stated by an arbitrator in the form of a special case.

The material parts of the special case are fully stated in the report of the case in the Divisional Court. (1)

For the purposes of this report, the facts may be summarized as follows:—

The claim in respect of which the dispute arose was a claim by the owner of a steamship against an insurance association upon a marine policy of insurance on freight. It was a time policy, and incorporated the rules of the association. The risks insured against included perils of the sea, and by rule 8 it was provided that "no claim arising from the cancelling of any charter, nor for loss of time under a time charter," should be allowed. On October 10, 1893, whilst the policy was in force, a charterparty was entered into by the owner of the ship, by which the ship was to proceed to Kotka and there load a cargo for Honfleur. The charterparty did not contain any provision for cancellation of the charter if the ship did not arrive at Kotka by

(1) [1895] 1 Q. B. 510.

a certain date. On October 14, on her way to Kotka, the ship was stranded and sustained considerable damage. The repair of this damage was not completed until December 11, when the port of Kotka had become closed for the winter by ice.

In answer to an inquiry by the charterers on October 26 whether he would cancel the charterparty, the shipowner refused to do so. The charterers refused to load the ship, and forwarded their cargo by another steamer.

The arbitrator found that on October 14 the ship was damaged by perils of the sea, and that the time necessary for repairing the damage was so long that the voyage contemplated by the charterparty became in a commercial sense impossible, and that there was a loss of freight by perils insured against, in respect of which the shipowner was entitled to recover a certain amount under the policy, if his claim was not a claim arising from the cancellation of a charterparty within rule 8. But he found that, construing the words of rule 8 in the sense in which they would be ordinarily understood by men of business, especially having regard to the object of the words in question, the charterparty was cancelled within the meaning of the rule. He therefore awarded that, subject to the opinion of the Court on the aftermentioned question, the shipowner was not entitled to recover on the policy. The arbitrator stated that no witnesses were called before him to prove that the word "cancelled" had any technical or peculiar meaning in shipping or insurance business. The question for the Court was whether the claim of the shipowner was a claim arising from the cancelling of a charterparty within the meaning of rule 8.

The Divisional Court held that it was.

Bigham, Q.C., and *Maurice Hill*, for the shipowner. There was no cancellation of the charter in this case. The clause with regard to cancellation of the charter is inserted in policies on freight to meet the case of charters which contain the well-known clause entitling the charterer to cancel the charter if the ship does not arrive at the port of loading by a certain date. Cancellation means putting an end to the contract by the act or agreement of the parties. That may occur in two ways. The

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parties may agree that the contract shall be rescinded; or they may agree at the time of making it that in a certain event one of the parties shall have a right to rescind it. Here there was nothing in the nature of a rescission by agreement. By reason of a peril insured against the performance of the contract became impossible, and the freight was in consequence lost. There was therefore a loss within the terms of the policy, and the clause as to cancellation of a charter did not apply.

Finlay, Q.C., and *Scrutton*, for the insurance association. The word "cancellation" is not confined to a setting aside by the act of the parties. The contention made on behalf of the shipowner gives no meaning whatever to the clause with regard to cancellation of a charter. It is suggested that the clause was inserted to meet the case of charters which give the charterer an option to cancel the charter in the event of the ship's not arriving at the port of loading by a certain day; but a loss of freight by reason of the charterer's exercise of that option is not a loss by perils of the sea, and would not be covered by the policy: *Mercantile Steamship Company* v. *Tyser*. (1) Therefore the clause is not necessary for that purpose. Nor could a loss of freight by reason of an agreement to cancel the charter be within the policy, because such a loss could not be a loss by a peril of the sea. Assuming that "cancellation" involves an agreement of the parties, the term is not confined to cases of cancellation by express agreement: *Adamson* v. *Newcastle Steamship Freight Insurance Association*. (2) What difference can there be for this purpose between an express agreement that in a certain event the charterparty shall come to an end and an agreement implied by law that it shall do so? The law implies an agreement that, if the mercantile adventure is frustrated by delay occasioned by a peril of the sea, the charterparty shall be at an end. The word "cancel" for this purpose merely means "annul."

Maurice Hill, in reply.

LORD ESHER M.R. In this case a shipowner claimed against an insurance club on a policy of insurance on freight; and the

(1) 7 Q. B. D. 73. (2) 4 Q. B. D. 462.

question is whether under the following circumstances he is entitled to recover.

The ship was chartered by a charterparty which did not contain the well-known clause inserted in many charterparties to the effect that, if the ship does not arrive at the port of loading by a certain date, it shall be in the power of the charterer to cancel the charter. The ship sailed for the port of loading, and while on her way there was stranded and seriously damaged; and it took so long to repair her that the mercantile adventure contemplated by the charterparty became impossible, so that the charterers could not load the ship nor the shipowner carry the cargo on that adventure. It was put an end to by reason of perils of the sea. Consequently, unless there was some special stipulation to prevent the policy from applying, there was a clear loss of the chartered freight by perils of the sea within the meaning of the policy. The underwriters rely on the clause which provides that "no claim arising from the cancelling of any charter" shall be allowed. They contend that within the meaning of that clause this charter was cancelled. This policy must be construed according to the ordinary rule applicable to the construction of contracts, namely, that the words used must be construed in accordance with their ordinary business sense in the English language, unless there is some absolute necessity to the contrary. What is the ordinary business meaning of the word "cancel" in the English language? If there is no stipulation in the contract with reference to cancellation, neither party alone can cancel the contract; it can only be cancelled by mutual consent of both parties. In some cases charters contain what is known as a cancelling clause. In such cases both parties agree beforehand that that shall be part of the contract; but from a business point of view it would be said that the effect of it is that, if the ship does not arrive at the port of loading by a certain date, the charterer, without any further consent of the shipowner, although the latter be desirous of having the ship loaded, may cancel the charter. The term "cancel" is used there, because both parties have agreed beforehand that in the given event the charter may be cancelled. In such a case, if the ship is so delayed, whether by a peril of the sea or by any

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other cause, that she does not reach the loading port by the date specified, the charterer is at liberty to cancel the charter, but is not bound to do so. But when the circumstances give the charterer an option whether he will cancel the charter or not, the cancellation is an act of his own will. But in this case, even if this charter had contained a cancelling clause, would the charterers have had any option in the matter? The finding of the arbitrator is that the mercantile adventure contemplated by the charter was at an end. If so, it was impossible for the charterers to load and for the shipowner to carry goods under that charter, though they might of course make a fresh agreement to load and carry goods on the terms contained in the former charter. They were therefore neither of them in a position to talk about cancelling the charter or to agree to cancel it. It was gone by reason of such a delay having taken place through perils of the sea that the mercantile adventure was at an end. Under these circumstances could anybody say that, according to the ordinary business meaning of language, this charter was cancelled? It was not put an end to either by the will of the charterer or by the agreement of both parties. That being so I do not think there was any cancellation of the charter. The loss was one occasioned directly by a peril of the sea, and was not within the exception created by the clause of the policy upon which the underwriters rely; and therefore the policy applies and the shipowner is entitled to succeed. For these reasons I think the judgment of the Divisional Court should be reversed.

A. L. SMITH L.J. In this case a claim is made by a shipowner against underwriters upon a time policy upon freight. He alleges that he lost his chartered freight during the time covered by the policy by a peril of the sea, and therefore there was a loss covered by the policy. The underwriters rely on a clause in the policy which provides that "no claim arising from the cancelling of any charter nor for loss of time under a time charter" shall be allowed, and they say that under the circumstances of this case there was a cancellation of the charter within the meaning of that clause. The question is whether they have

made that out. The facts upon which that question depends are these. The shipowner had chartered his ship to carry a cargo from Kotka to Honfleur at an agreed freight. While the ship was sailing to Kotka she was so much damaged through perils of the sea that she was unable to fulfil her engagement, and, according to the doctrine laid down in *Jackson* v. *Union Marine Insurance Co.* (1), the mercantile adventure being thereby frustrated, the shipowner was not bound to proceed with the voyage, and the charterers were not bound to load the ship. It is argued that under these circumstances the charter was cancelled within the meaning of the clause. I agree that, if a clause in a document is perfectly clear according to the grammatical meaning of the language used, it is not legitimate to consider the consequences of construing it according to that meaning. But it is quite permissible to consider the results of construing this clause according to the contention of the underwriters, for the question is what is the meaning of "cancelling" in it. It was not denied that, if the ship were prevented by perils of the sea from getting to the port of loading by reason of her going to the bottom on her way there, the underwriters would be liable. Why so, if their present contention is correct? for why should they not be entitled to argue that in that case also the freight was lost by a cancellation of the charter? It is obvious that in that case the freight would be lost simply because it was rendered impossible for the ship to carry out the voyage by perils of the sea, as in the present case the contemplated voyage is frustrated, and I cannot see any real distinction between the one case and the other. The ship here, instead of going to the bottom, became so much damaged that she could not continue the voyage till after so long a delay that the mercantile adventure was frustrated. What is the difference between the two cases for this purpose? I cannot see that in either case there is any cancellation of the charter within the meaning of the clause. The peril of the sea in each case has caused the loss of the chartered freight. I think that cancellation of the charter means rescission of it by reason of an agreement of the parties in that behalf. I am fortified in this conclusion by the second part of the clause, which relates to

(1) L. R. 10 C. P. 125.

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loss of time under a time charter. Such loss of time can only be by reason of an agreement between the charterer and the shipowner. What this last clause means is that, if under a time charter the ship is laid up, and by agreement time is then not to count, the underwriters will not be responsible for loss of freight arising therefrom. I read the first part of the clause as indicating a similar agreement for cancellation of the charter. It seems to me that the meaning given to the word "cancel" in the judgment of the Divisional Court would import that it includes all cases in which the charter has ceased to have any effective existence. But that construction would obviously be too wide, because it would cover the case of a total loss of the ship by perils of the sea on her way to the port of loading. For these reasons I do not think that there was a cancellation of the charter within the meaning of the clause relied upon by the underwriters, and the appeal should be allowed.

RIGBY L.J. I am of the same opinion. The only question is as to the meaning of the word "cancelling" in this policy. The arbitrator has found in the case that, construing the words of rule 8 in the sense in which they would ordinarily be understood by men of business, especially having regard to the object of the words in question, the charterparty was cancelled within the meaning of the rule; but he submits the question whether that is so for determination by the Court, and makes an alternative finding as to the amount recoverable in the event of the Court not agreeing with his view. He further states that no witnesses were called to shew that the word "cancelled" had any technical or peculiar meaning in shipping or insurance business. We must therefore consider what the meaning of the word is according to the ordinary use of language. If events happened that induced the parties to agree to put an end to the charter, or, if by pre-arrangement in a certain event one party was to be entitled to put an end to it, and did so, then it might properly be said to be cancelled. But there are other matters by which a charterparty may be put an end to and a loss of the freight thereby occasioned which are clearly not cancellation. In the present case the arbitrator finds that the ship was damaged by a

sea peril, and the time taken in repairing her was so long that the adventure became in a mercantile sense impossible, because the port of loading was closed for the winter by ice. Assuming that "cancelling" means something done by agreement of the parties, it is clear from the correspondence set out in the case that the shipowner refused to agree to cancel the charter. It appears to me that there was no cancellation of the charter within the meaning of rule 8, and therefore judgment ought to be given that the shipowner is entitled to recover the amount mentioned in the alternative finding of the arbitrator.

Appeal allowed.

Solicitors for shipowner: *Botterell & Roche.*
Solicitors for insurance association: *Thomas Cooper & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1895 *May* 16.

ABBOTT & CO. *v.* WOLSEY.

Sale of Goods—Acceptance—"Act which recognises a pre-existing Contract of Sale"—Statute of Frauds—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71) *s.* 4, *sub-s.* 1, 3.

Where goods sold were delivered to the buyer, who took a sample from them, and, after examining it, said that the goods were not equal to his sample, and that he would not have them:—

Held, that there was evidence of an act done by him in relation to the goods which recognised a pre-existing contract of sale, and therefore evidence of an acceptance within the meaning of s. 4 of the Sale of Goods Act, 1893.

APPEAL from the judgment of a Divisional Court (Wills and Wright JJ.) allowing an appeal from the Wandsworth County Court.

The action was brought to recover damages for non-acceptance of hay alleged to have been sold by the plaintiffs to the defendant.

The facts so far as material were as follows.

The plaintiffs on July 13, 1894, sold to the defendant twenty tons of Dutch hay, to be delivered at defendant's wharf at Nine Elms, "barge to be alongside on or before July 21, 1894, or order cancelled." There was no memorandum in writing of the

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contract signed by the defendant, or an agent on his behalf. The barge was not alongside the defendant's wharf by July 21, and on August 4 the plaintiffs sent a messenger to the defendant to ask whether he would then accept the hay. The defendant said that he would take the hay if the barge was alongside his wharf by August 8. The barge was alongside on that day, and the plaintiffs' lighterman handed to a servant of the defendant a receiving note for the hay, which was not returned. The defendant came on board the barge, took a sample of the hay, and, after examining it, said, "The hay is not to my sample, and I shall not have it." It was contended for the plaintiffs that there was, and for the defendant that there was not, an acceptance by the defendant of the hay within the meaning of the Sale of Goods Act, 1893, s. 4.

The county court judge gave judgment for the plaintiffs, but the Divisional Court on appeal reversed his decision. (1)

Channell, Q.C., and *H. A. Forman*, for the plaintiffs. There was evidence of an act done by the defendant in relation to the goods, which recognised a pre-existing contract of sale. If there was such evidence, the Divisional Court had no jurisdiction to review the finding of the county court judge upon it. [They were stopped by the Court.]

Witt, Q.C., and *Fraser Macleod*, for the defendant. There was no evidence of an acceptance of the hay within the meaning of s. 4, sub-s. 3, of the Sale of Goods Act, 1893. That Act codifies the law as it existed before the Act, and therefore the decisions under the Statute of Frauds are applicable. *Taylor* v. *Smith* (2) shews that there was no acceptance in this case. In that case

(1) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 :—

"(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

"(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not."

(2) [1893] 2 Q. B. 65.

Kay L.J. says: "What the defendant did, immediately after examining the goods, having been to refuse them, how can it be said that he accepted them?" *Page* v. *Morgan* (1) is distinguishable, for there the purchaser did more than merely inspect the goods: he had some of them taken into his mill. Sub-s. 3 of s. 4 speaks of an "act" which recognises a pre-existing contract of sale. Therefore words recognising such a contract will not suffice. There must be such an act as in itself, apart from words, recognises a pre-existing contract. The legislature distinguishes in this respect between an acceptance for the purpose of satisfying the Statute of Frauds and an acceptance which precludes the buyer from rejecting the goods. By s. 35 of the Sale of Goods Act, 1893, which deals with the latter sort of acceptance, an intimation of acceptance by words is sufficient. There must be such an act as is only consistent with a pre-existing contract. The mere act of inspecting the goods is not such an act. It is not enough that there should be an act which may be referable to a pre-existing contract. If the act is consistent with the non-existence of a pre-existing contract, it is not sufficient to constitute an acceptance within the section. The defendant in this case may have examined the goods to see whether he would buy them apart from any pre-existing contract. The words "not equal to my sample" may merely have meant that the hay was not up to his standard.

LORD ESHER M.R. The question raised in this case was whether there had been an acceptance of the hay within the meaning of the Sale of Goods Act, 1893, s. 4, sub-s. 3. No question was raised as to whether there had been a delivery of the goods or not. On an appeal from a county court the only jurisdiction which the Court has is to determine some question of law which was raised before the county court judge. The only question of law before the Court is, not whether there was an acceptance of the goods within the statute, but whether there was evidence on which the county court judge might properly find that there was such an acceptance. Cases have been cited which were decided before the passing of the Sale of Goods Act,

(1) 15 Q. B. D. 228.

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Lord Esher M.R.

1893. It may be that the decisions on the subject were not quite consistent; but, assuming that to be so, it is now immaterial, for the legislature have undertaken to determine which of the decisions was correct. The statute was passed to declare the law. We are bound by it, and can look to nothing else. Contrasting s. 4, sub-s. 3, with s. 35 of the Act, the meaning of the former seems to me very clear. The effect of the Statute of Frauds was that certain conditions had to be fulfilled before a contract for the sale of goods of the value of ten pounds or upwards could be enforced by action. If there was no written memorandum of the contract, and if none of the other matters mentioned in the statute existed, the Court could not inquire further into the question whether there was a contract or not. If there was a memorandum in writing of the contract signed by the party to be charged or his agent, the statute was satisfied. There was another way in which the statute might be satisfied, and the Court enabled to hold that there was a contract, although there was no written memorandum, namely, by proof that the goods had been delivered by the seller and accepted by the purchaser. Mere delivery to the purchaser was not equivalent to acceptance by him. But it is clear that the term "acceptance" is used in two senses. The acceptance that satisfies the Statute of Frauds and the acceptance that binds the purchaser to pay for the goods are different things. When s. 4, sub-s. 3, is contrasted with s. 35 of the Sale of Goods Act, 1893, it is obvious that the statute recognises this difference. The acceptance under s. 4 is such an acceptance as will shew the existence of a contract which the Court may enforce. Sub-s. 3 of s. 4 provides that there shall be an acceptance of goods within the meaning of the section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not. The acceptance described in s. 35 which is to bind the purchaser to pay for the goods is a different thing. The only question here is as to the existence of the kind of acceptance mentioned in s. 4. Therefore, the observations of judges which have been cited to the effect that a purchaser cannot be held to accept goods when he says that he rejects

them seem to me beside the mark. In the case before us the goods are sent to the defendant with a delivery note, which is an intimation by the seller that he is delivering the goods under a contract. The defendant keeps the note, which is a recognition that there is to be such a delivery; and the question is whether there is an acceptance by him. The goods being so delivered, the defendant proceeds to inspect them. It may be that mere inspection would not amount to an act which recognises a pre-existing contract; but, if the defendant does an act, and uses words with regard to that act, those words are material as explaining the act and shewing the nature of it. Here the defendant took what is known in business as a sample. He not only took that sample, but he said that it was not equal to his sample; by which he must have meant some sample previously given to him in connection with a contract for the sale of hay. He did not take the sample merely in order to inspect the quality of the hay, but to see whether it was equal in quality to another sample. I think that that act of taking a sample as explained by the words which accompanied it was an act which recognised a pre-existing contract; at all events, it was evidence upon which the county court judge might properly come to the conclusion that the sample was taken as a bulk sample to be compared with a former sample given in connection with a contract for the sale of the hay, and therefore that the act of taking it was a recognition of an existing contract for the sale of the hay. The only question which we have jurisdiction to determine is whether there was such evidence or not. If there was, we cannot overrule the finding of the county court judge. For these reasons I think the appeal must be allowed.

A. L. SMITH L.J. I agree. In this case the action was for non-acceptance of goods, and there was no memorandum in writing of the contract for the sale signed by the defendant or his agent. That being so, the point raised is whether there has been an acceptance of the goods within s. 4 of the Sale of Goods Act, 1893. It does not appear to have been disputed that there was an actual receipt of the goods by the defendant, and no point has been raised with regard to that. The jurisdiction of

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the Queen's Bench Division upon appeals from county courts is confined to questions of law, and if there is any reasonable evidence upon which the finding of a county court judge can be supported, the legislature has not given the Queen's Bench Division jurisdiction to overrule that finding. The only question of law, therefore, which arises in this appeal is whether there was any evidence upon which the county court judge could reasonably find that there was an acceptance of the goods within the meaning of s. 4 of the Sale of Goods Act, 1893. It is not necessary to go back to the decisions prior to the Act, nor to the case of *Taylor* v. *Smith* (1), in which Lord Herschell held that mere inspection would not suffice, because the Act has codified the law, and has expressly enacted what shall be a sufficient acceptance for this purpose. Sect. 4, sub-s. 1, provides that a contract for the sale of goods of the value of ten pounds or upwards shall not be enforceable by action unless (among other things) the buyer shall accept part of the goods so sold, and actually receive the same. This section, however, does not stop there, but on account of the prior decisions on the subject it goes on to provide in sub-s. 3 that there shall be an acceptance of goods within the meaning of the section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not. The question what shall be an acceptance in performance of the contract is dealt with by s. 35, and we have nothing to do with that. The question, therefore, which we have to decide is whether there is any evidence of an act done by the defendant in relation to the goods which recognised a pre-existing contract of sale. It appears to me to have been proved that there was in this case a parol contract to take delivery of the hay on July 21, which was afterwards altered by parol to a contract to take delivery if it was delivered by August 8. It was delivered by that date. The defendant thereupon went to the place where the hay was and took a sample of it, and upon so doing said that it was not equal to his sample, and he would not have it. The question is whether the act of taking the sample accompanied by that declaration was evidence upon which the county

(1) [1893] 2 Q. B. 65.

court judge could reasonably find that an act was done by the defendant in relation to the goods which recognised a pre-existing contract of sale. It seems to me impossible to answer that question otherwise than in the affirmative. The county court judge having so found, the Divisional Court had no jurisdiction to overrule his finding, there being reasonable evidence to support it. I therefore think that the appeal should be allowed.

RIGBY L.J. I am of the same opinion. The Sale of Goods Act, 1893, following the provisions of the Statute of Frauds, makes mere oral contracts for the sale of goods of the value of ten pounds or upwards not enforceable by action, unless certain acts are done having reference to the contract.

The question in this case was whether there was an acceptance of the goods by the buyer, which by sub-s. 3 of s. 4 means any act done by him in relation to the goods which recognises a pre-existing contract of sale. What are the facts of the case? The hay was sent to the defendant's wharf, and with it was sent a receiving note. He was told by that note who was sending the hay, and must have known from its terms that it imported a delivery of the hay under a previous contract, not an offer of it for sale. Thereupon the defendant takes a sample of the hay and inspects it, which is certainly an act done in relation to the goods; and then he explains by contemporaneous words the act he is doing. The effect of what he says is that he is inspecting the hay in order to see whether it is equal to sample. The mere words would as such produce no effect; but an act done in relation to the goods which recognises a pre-existing contract of sale is sufficient. In this respect the provision of s. 4, sub-s. 3, differs from that of s. 35, which deals with acceptance in performance of the contract, and provides that such acceptance may be not only by acts, but by intimation to the seller that the goods are accepted. I think there was clearly evidence of an acceptance of the hay within the meaning of s. 4 of the Act.

Appeal allowed.

Solicitor for plaintiffs: *W. Batham.*
Solicitor for defendant: *Henry Foskett.*

E. L.

1895
May 17

THE VESTRY OF THE PARISH OF ST. LEONARD, SHOREDITCH *v.* THE LONDON COUNTY COUNCIL.

Poor-rate—Deficiency in Rates where Property taken by Promoters of Undertaking—Owners Compounding—Liability of Promoters—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 133—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 3.

By s. 133 of the Lands Clauses Consolidation Act, 1845, the promoters of an undertaking, who have become possessed by virtue of that or the special Act of lands liable to be assessed to the poor-rate, shall from time to time, until the works be completed and assessed to the poor-rate, "be liable to make good the deficiency" in the assessments for the poor-rate by reason of such lands having been taken for the purposes of the works; "and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act."

The owners of houses on land taken by the promoters of an undertaking for the purposes of their works had made agreements under s. 3 of the Poor Rate Assessment and Collection Act, 1869, with the rating authority of the district to pay the rates instead of the occupiers, subject to being allowed a deduction of 25 per cent. from the amount of such rates, and those agreements were in force when the promoters took the land:—

Held that, on the true construction of s. 133, the deficiency which the promoters were liable to make good must be computed having regard to the rateable value at the time the special Act was passed, and that they were not entitled to claim the deduction of 25 per cent. from the amount of the rates levied according to that value.

Special case stated in an action.

The facts stated in the case were, so far as they are material for the purposes of this report, as follows.

The plaintiffs under a local Act have power to levy in the parish of St. Leonard, Shoreditch, certain rates for the relief of the poor of that parish. The defendants are constituted, by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), the local authority in the county of London for the purposes of Parts I. and III. of that Act. The defendants, under the powers conferred by the same Act, made an improvement scheme for the purpose of reconstructing and rearranging the streets and houses in a certain unhealthy area partly in the parish of St. Leonard, Shoreditch. Such scheme was duly authorized by a Provisional

Order made by the Secretary of State for the Home Department, and that order was confirmed by Act of Parliament. In carrying out the scheme the defendants purchased and took lands, with houses thereon, under Part I. and Part III. (which had been adopted by them) of the Act, and pulled down some of the houses. The action was brought to recover, under s. 133 of the Lands Clauses Consolidation Act, 1845 (1), a sum of 398*l.*, as being the deficiency in the assessment of the poor-rates in respect of the property so taken by the defendants.

The owners of certain of the houses, the rateable values of which respectively did not exceed 20*l.*, had agreed with the plaintiffs, under s. 3 of the Poor Rate Assessment and Collection Act, 1869 (2), to become liable for the poor-rates assessed in

(1) The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 133: "If the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax or liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act."

By s. 20 in Part I. of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), the clauses of the Lands Clauses Acts (with certain exceptions which do not include s. 133 of the Lands Clauses Consolidation Act, 1845) are incorporated in that part of the Act, and are to regulate and apply to the purchase and taking of lands.

By ss. 56 and 57, with respect to the execution of Part III. of the Act where it has been adopted by a local authority, land for the purposes of Part III. may be acquired by a local authority in like manner as if those purposes were purposes of the Public Health Act, 1875, and ss. 175 to 178 of that Act (relating to the purchase of lands) shall apply accordingly.

By s. 176 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), with respect to the purchase of lands by a local authority for the purposes of this Act, the Lands Clauses Consolidation Act, 1845, is (inter alia) incorporated with the Act.

(2) The Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 3: "In case the rateable value of any hereditament does not exceed 20*l.*, if the hereditament is situate in the metropolis, . . . and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor-rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor-rates

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respect of those houses until such agreement should be determined by either party, and to pay the rates whether the hereditaments were occupied or not, and the plaintiffs had agreed with such owners to receive the rates from them respectively, and to allow them respectively a commission of 25 per cent. on the amount thereof. Those agreements had not been determined when possession of the land and houses was taken by the defendants, and no agreement of a like nature has been entered into between the plaintiffs and the defendants.

The first and second questions for the opinion of the Court were in substance: Whether, with respect to the lands and houses taken under Parts I. and III. respectively of the Housing of the Working Classes Act, 1890, the defendants were liable to make good the deficiencies in the poor-rates caused by their having taken possession of those lands and houses, i.e., whether s. 133 of the Lands Clauses Consolidation Act, 1845, was incorporated into Parts I. and III. respectively of the Act of 1890. (1)

The third question was whether, if the first and second questions were answered in the affirmative, the defendants were entitled to a deduction from the amount claimed equal to the commission of 25 per cent. on the poor-rates levied on those premises in respect of which the previous owners had compounded for the rates under s. 3 of the Poor Rate Assessment and Collection Act, 1869.

Poland, Q.C. (*C. E. Allan* with him), for the plaintiffs. In computing the deficiency which the defendants are liable, under s. 133 of the Lands Clauses Consolidation Act, 1845, to make good, the rateable value of the property at the time the special Act was passed must be regarded, and not the sum payable by

whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow him a commission not exceeding 25 per cent. on the amount thereof."

(1) It is thought unnecessary to report the decision on the first two questions. On an examination of the statutes it appeared clear to the Court that s. 133 was incorporated, and counsel for the defendants did not dispute that, strictly construed, the legislation had that effect.

the former owners by virtue of their agreement to compound for rates under s. 3 of the Poor Rate Assessment and Collection Act, 1869. In *Overseers of Putney* v. *London and South Western Ry. Co.* (1) Lord Esher M.R. and Bowen L.J. pointed out that under s. 133 the deficiency must be computed by taking the assessment at the time the special Act was passed as compared with the existing assessment. The defendants are not entitled to the deduction claimed.

[He also referred to *Reg.* v. *Dodd.* (2)]

Lawson Walton, Q.C. (*W. C. Ryde* with him), for the defendants. The loss in respect of poor-rates, which the plaintiff vestry have sustained through the houses in question having been taken and pulled down by the defendants, is the sum which the former owners were liable to pay under their agreements with the rating authority. By those agreements the plaintiffs were saved possible loss to the rates through the houses being unoccupied. It could not have been intended by the legislature that the rating authority should make a profit out of the demolition of houses by a railway company or other body. The true construction of s. 133 of the Lands Clauses Consolidation Act, 1845, is that the promoters shall make good the deficiency having regard to what the vestry, at the time the property is taken, can recover in respect of rates from somebody. The words, "shall be liable to make good the deficiency in the several assessments, &c.," mean shall be liable to make good the real deficiency; "assessment," where the owner has compounded for the rates under the Poor Rate Assessment and Collection Act, 1869, means the sum for which he has become liable. By s. 4 of that Act vestries may order that the owner shall be rated instead of the occupier. By s. 5 the owner is only entitled to the deduction if he pays the rate within a specified time—if he does not the overseers may recover the whole amount; and by s. 11, where the owner has become liable to the payment of the poor-rates, the rates due may be levied on his goods and be recovered from him in the same way as poor-rates may be recovered from the occupier. Those provisions shew that it is the owner who is assessed. In estimating the deficiency which the defendants

(1) [1891] 1 Q. B. 440. (2) L. R. 1 Q. B. 16.

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are liable to make good, they are, therefore, entitled to the deduction of 25 per cent. from the rateable value of the property at the time the special Act was passed.

LORD RUSSELL of KILLOWEN C.J. (after giving judgment on the first and second questions asked in the special case, which his Lordship decided ought to be answered in the affirmative). As to the third question, I do not feel so strongly that I am right; but still I think that our judgment ought to be against the defendants upon the point raised by that question. It turns upon the proper construction of s. 133 of the Lands Clauses Consolidation Act, 1845, and especially upon the latter part. That section enacts that in certain events, which have happened in this case, the promoters of the undertaking shall be liable to make good "the deficiency in the several assessments for land tax and poor's rate," and it proceeds: "and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act." The legislature, therefore, plainly have declared the mode in which the deficiency is to be computed. The actual loss is not the test; if it were, in the case of unoccupied property there could hardly be said to be any loss at all, and the rating authority could get nothing. There is express authority for that in the decision of the Court of Appeal in *Overseers of Putney* v. *London and South Western Ry. Co.* (1) In that case there was no beneficial occupation existing with respect to some of the houses taken by the promoters, and it could have been said, as to those houses, that there was no loss at all. Both Lord Esher M.R. and Bowen L.J., however, said that in computing the deficiency the assessments at the time of the passing of the special Act must be the test, and indeed Bowen L.J. used language wide enough to cover this case. He said: "Reference to the words of the Act of Parliament will shew that when the deficiency has to be computed it is not to be arrived at by taking the existing assessment and the payment formerly made; but it is to be computed according to the rental at which the lands were valued or rated at the time of the passing of the

(1) [1891] 1 Q. B. 440.

special Act. It is not a question of what was paid, but a question of what was assessed." Under the Poor Rate Assessment and Collection Act, 1869, there is, no doubt, power for the rating authority and the landlord to agree upon a commutation in respect of the rates, and there are, no doubt, provisions enabling the landlord to be rated at a less figure; but the rateable value and rental remain the same. There is one fixed rateable value; but the landlord by the terms of his bargain is entitled to demand the deduction of a commission of 25 per cent. on the amount of the rates. The transaction, no doubt, effects a saving of expense and loss to the rating authority; but the very bargain itself recognises the existence of the rateable value, which it leaves untouched; and it is a bargain which can be put an end to by either party.

On these grounds I am of opinion that we must answer the first and second questions in the affirmative; and say, as to the third, that the deduction claimed by the defendants ought not to be made.

CHARLES J. I entirely agree with my Lord's judgment, and I have nothing to add.

Judgment accordingly.

Solicitor for plaintiffs: *H. Mansfield Robinson.*
Solicitor for defendants: *W. A. Blaxland.*

W. A

1895
May 16.

THE BARRY AND CADOXTON LOCAL BOARD *v.* PARRY.

Local Government—Streets—Paving Expenses—Liability of Frontager—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

Under s. 150 of the Public Health Act, 1875, an urban sanitary authority has power to require the owner of premises fronting on a street, not being a highway repairable by the inhabitants at large, to pave and channel such street, notwithstanding that it has already been paved and channelled to the satisfaction of such authority.

APPEAL from a decision of the judge of the Cardiff County Court.

The action was brought to recover (inter alia) the expenses incurred by the plaintiffs in paving and channelling two streets.

The following facts appeared from the judge's notes :—

Prior to 1889 the streets in question were laid out as private streets by the then owners of the land. At that time the streets were within the district and jurisdiction of the Cardiff Union rural sanitary authority, who approved the plans and specifications deposited by the owners, and the streets were paved and channelled in accordance with such plans and specifications.

In 1889 the plaintiff board was constituted the urban sanitary authority of the district under the Public Health Act, 1875 (38 & 39 Vict. c. 55). The plaintiffs expressed no dissatisfaction with the paving and channelling of the two streets until 1891, when their surveyor gave notice, under s. 150 of the Public Health Act, 1875 (1), to the defendant and other owners of pro-

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150 : "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway, footway, or any other part of such street is not sewered . . . paved, . . . channelled and made good . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may be required to be sewered . . . paved . . . or channelled, require them to sewer . . . pave . . . channel or make good . . . the same within a time to be specified in such notice. . . . If such notice is not complied with, the urban authority may, if they think

perty abutting upon the streets to pave and channel them according to plans and sections made under the direction of the surveyor. The streets had not become highways repairable by the inhabitants at large. The defendant having failed to comply with the notice, the plaintiffs did the work themselves, and sued the defendant to recover the apportioned amount, which was under 50*l.*, of the expenses incurred by them in so doing.

The county court judge was of opinion that, as the Cardiff Union rural sanitary authority had approved the plans submitted to them, and as the paving and channelling work had been properly done in accordance with those plans, they must be held to have been satisfied with such work; and, further, that as the plaintiffs had not expressed any dissatisfaction with the work so done, and had not taken any steps shewing such dissatisfaction within a reasonable time after they had become the local authority of the district, they also must be taken to have been satisfied with the work; and, on those grounds, he gave judgment for the defendant in respect of the expenses of paving and channelling.

The plaintiffs appealed.

F. Lowe (*J. Pleas* with him), for the appellants. There is no sufficient evidence that the rural authority or the plaintiffs ever approved the paving and channelling work done by the owners on the two streets in question. The rural authority had no power to approve such work, because the power was never given to them by order of the Local Government Board. The county court judge was wrong in holding that the plaintiffs approved of the work because, after they came into existence as the urban sanitary authority of the district, they expressed no dissatisfaction with it. Whether the plaintiffs were satisfied or not they could, under s. 150 of the Public Health Act, 1875, call upon the frontagers to pave and channel the streets again so long as they had not become highways repairable by the inhabitants at large.

fit, execute the works mentioned or referred to therein; and may recover . . . the expenses incurred by them in so doing from the owners in default according to the frontage of their respective premises," &c.

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By the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 20 (which has been adopted by the urban authority in this case), the owners can compel the urban authority to declare any street, which has been paved, channelled, &c., to their satisfaction, to be a highway repairable by the inhabitants at large. These streets, not having been paved and channelled to the plaintiffs' satisfaction, the owners remain liable to do the work. The cases which have been decided with respect to sewers do not apply to the paving and channelling of private streets, because by ss. 13 and 15 of the Public Health Act, 1875, all sewers vest in the local authority and are repairable by them.

C. J. Jackson, for the respondent. The paving and channelling having been done to the satisfaction of the rural authority, and a long period of time having elapsed without any expression by the plaintiffs of their dissatisfaction, the latter must be taken to have been satisfied within the meaning of s. 150. That section should receive the reasonable construction which was put upon it in *Fulham Board of Works* v. *Goodwin* (1), *Bonella* v. *Twickenham Local Board of Health* (2), and *Hornsey Local Board* v. *Davis*. (3) Those were all cases, it is true, relating to sewers; but sewering is included in s. 150 as well as paving and channelling, and for the purpose of construing that section the work done on the surface of the street must be treated in the same way as the making of sewers. It would be an unreasonable and oppressive construction to hold that the frontager was liable from time to time and for ever to be called upon to level, pave, and channel a street which was not a highway repairable by the inhabitants at large; and, at any rate where the Private Street Works Act, 1892, has not been adopted, he cannot compel the local authority to take over the street. The legislature cannot have intended to cast such a burden upon frontagers. The decision of the county court judge was right.

LORD RUSSELL of KILLOWEN C.J. With great respect for the learned county court judge I think his judgment in this case was wrong. The facts are these. The defendant was owner of

(1) 1 Ex. D. 400. (2) 18 Q. B. D. 577; 20 Q. B. D. 63.
(3) [1893] 1 Q. B. 756.

property abutting upon two streets. In 1886 those streets were within the jurisdiction of the then existing local authority, which was the Cardiff Union rural sanitary authority, and whilst they were within that jurisdiction it is clear that houses were built by the owners of the land, and plans and specifications were prepared and submitted to the rural authority setting forth how the owners proposed to deal with the matters—paving, channelling, and so forth—referred to in s. 150 of the Public Health Act, 1875. It also appears that those plans and specifications were approved by the rural authority. It was argued that the rural authority had no authority to approve them; but in the view I take of the case it becomes immaterial to consider whether they had or had not. It further appears that, following on the approval of the plans, the work was done by the owners. It does not appear that there was any express approval by the rural authority of the work, but the county court judge has found that the work was properly done according to the plans, and that no objection to the work was taken by the rural authority. It is, therefore, not an unfair presumption that they did approve of the work so done. The area within which are the two streets remained within the jurisdiction of the rural authority until the year 1888, and at the end of that year or the beginning of 1889 the present urban sanitary authority came into existence. It has been suggested on behalf of the defendant that they ought straightway to have made up their minds whether the work of paving, channelling, &c., the two streets was satisfactory or not, and to have expressed their opinion upon it. If it be necessary to decide that question, I do not think that the urban authority were so bound. It would cause very great inconvenience and expense if we were to hold that urban authorities were bound, immediately upon coming into existence, to give notices wholesale as to all the streets within their jurisdiction, not being highways repairable by the inhabitants at large, the paving, channelling, &c., of which they might think unsatisfactory. In August, 1891, the urban authority gave notice to the defendant calling upon him to do certain things with respect to the paving, channelling, &c., of the two streets. He did not comply with that notice, and thereupon the urban

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Lord Russell C.J.

authority did the work themselves. The question is whether, with respect to the items of paving and channelling, the urban authority are entitled, on the facts of this case, to enforce against the defendant, as owner of land abutting on the streets, payment of the expenses they have incurred. That depends mainly upon what is the true construction of s. 150 of the Public Health Act, 1875. In order to get at its meaning it may be well to contrast it with s. 149. That section is addressed to the case of streets which at the time of the passing of the Act were, or which might at any time thereafter become, highways repairable by the inhabitants at large, and the effect is to vest those streets in, and place them under the control of, the urban authority, and further to put upon such authority the obligation to see that such streets are paved, channelled, and repaired as occasion may require. Sect. 150 relates to private streets. It enacts: [His Lordship read s. 150.] What is the proper construction? It was urged by counsel for the defendant that there had already been a satisfaction of a local authority as to the condition of the streets in question—namely, during the existence of the rural authority—that such satisfaction having once been expressed there was an absence of all obligation on the present owner to do anything more; and that anything more which might be required must be done by the urban authority. Now, it is not so unreasonable as at first sight it may appear that the obligation should remain upon the owner, because the better the condition in which the streets are kept with respect to works of paving, channelling, &c., the more convenient and the easier to let is the owner's property. There are also certain things which must be borne in mind by the public authority. They have to see, having regard to the health and convenience of the neighbourhood, that these private streets are kept in a proper condition. Is there anything in s. 150 which shews that the work must be done by the owners once for all? I find nothing of the kind, and I can see no satisfactory reason why it should be so. The same view would apply to sewering except that in another part of the Act are to be found a set of provisions—to which I will presently refer—which put the sewers in a different position from the other matters specified. Reading s. 150 according to

its literal and natural meaning, I am of opinion that so long as a street has not become repairable by the inhabitants at large, and is not paved and channelled to the reasonable satisfaction of the urban authority, they may call upon the frontagers to do what is necessary in those respects. As to sewers, ss. 13 and 15 shew how differently they are treated. Under the operation of s. 13 all existing and future sewers, with certain exceptions immaterial to consider here, are vested in the local authority; and by s. 15 they are bound to repair such sewers. It was said to be a great hardship on the owner that he should be subject to the recurring demands of the local authority in these respects of paving and channelling, but we ought not to assume that local authorities desire to act capriciously. If they ought reasonably to be satisfied with the condition of a private street it is not enough, in order to justify them in proceeding under s. 150, to say that they are dissatisfied. It was said that the local authority might for ever go on requiring the frontager to do works to the street, because there is no obligation upon them to take over the street and so relieve the frontager. It must be borne in mind, however, that in many cases the parties themselves, for the sake of their own privacy and convenience, would object to private streets being taken over and made repairable by the inhabitants at large, and I confess that that suggestion has little weight with me. We must give effect to s. 150 according to the plain grammatical meaning of what the legislature has said, unless there is something in the context which compels us to adopt some other meaning. If I saw any indication that the county court judge had proceeded upon the ground that the local authority were not reasonable in their demand, and that they ought to have been satisfied with the condition of these two streets, I should be very loth to interfere with his decision; but there is no suggestion whatever of that kind. It is not suggested that the local authority were not justified in saying that the streets were not in a reasonable condition of repair. The county court judge seems to have thought that, because a local authority had at one time approved of their condition, that was enough to discharge the owners from the obligation of doing anything more. For the reasons given I do

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not agree with that view. The reference I have made to ss. 13 and 15 of the Act renders it unnecessary to say anything about the authorities which have been cited. They all relate to the case of sewers. The appeal must be allowed, and the matter will be further dealt with according to an agreement which, we are told, has been made between the parties.

CHARLES J. I am of the same opinion. It is clear that the county court judge founded his decision on the facts that the rural authority in the first place, and the plaintiffs afterwards, had approved of the work done to those two streets, and he considered that to be decisive in favour of the defendant. I cannot agree with the view he seems to have taken of the construction of s. 150. It seems to me that unless and until a street has been declared, under s. 152, a highway repairable by the inhabitants at large, so much of s. 150 as relates to levelling, paving, metalling, flagging, channelling, and repairing may be put in operation as often as required. Sewering is in a different position, because ss. 13 and 15 vest sewers in the local authority, and cast upon them the obligation to repair. Streets, on the other hand, do not vest in the local authority until they have become highways repairable by the inhabitants at large. The cases cited with respect to sewers have, therefore, no application to such streets, as to which the obligation to repair remains with the owners. In *Corporation of Portsmouth* v. *Smith* (1) it was held that when once the owners had, at the instance of the corporation, done works of paving and flagging they could not be compelled to do the work over again; but in that case there was a local Act which, by reference to the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), provided that when once the occupiers of the land abutting upon the street had done the work the street should be repairable by the corporation. Similar provisions are contained in the Metropolitan Acts. But here no such duty is cast upon the local authority, so long as the street has not become a highway repairable by the inhabitants at large. I am unable to see why, under s. 150 of the Public Health Act, 1875, the local authority should not call upon the

(1) 13 Q. B. D. 184; 10 App. Cas. 364.

owners to repair streets, which have not become repairable by the inhabitants at large, when and so often as the case requires.

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Appeal allowed.

Solicitors for appellants: *Burton, Yeates & Co., for J. A. Hughes, Cadoxton.*

Solicitors for respondent: *Bell, Brodrick & Gray, for Harry Cousins, Cardiff.*

W. A.

In re SAUNDERS.
Ex parte SAUNDERS.

1895
May 23.

Bankruptcy—Jurisdiction—Pension inalienable by Indian Law—Order for Payment to Trustee—Exercise of Discretion—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 53, *sub-s.* 2.

The Court has jurisdiction, under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, to order payment of a pension, which is made inalienable by Indian legislation, to the trustee in bankruptcy of the holder, but, as a matter of discretion, such an order ought not to be made.

A retired officer of the Indian army had a pension, granted under the Indian Pensions Act, 1871, which by ss. 11 and 12 of that Act was inalienable, and by ss. 266 and 354 of the Indian Code of Civil Procedure was excepted from the property which vests in the receiver under an insolvency in India. An order was made, under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, directing payment of part of the pension to the trustee in bankruptcy of the holder:—

Held, that there was jurisdiction to make the order, but that, as its effect would be to defeat the object of the Indian legislature, it was wrongly made, and must be set aside.

Lucas v. *Harris* (18 Q. B. D. 127) followed.

APPEAL by the bankrupt from an order made in the county court at Wandsworth under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53, sub-s. 2. (1)

The bankrupt, who was a retired Major-General of the Indian

(1) By s. 53, sub-s. 2, "Where a bankrupt is . . . entitled to any half-pay or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the . . . half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the Court may direct."

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Army, had a pension, which had been granted to him under the Indian Pensions Act, 1871 (1), in respect of military service in India, and the order of the county court, from which he was appealing, directed payment to the trustee in his bankruptcy of a part of such pension.

Muir Mackenzie, for the bankrupt, in support of the appeal. There was no jurisdiction to make the order, because by Indian legislation the pension in question is expressly made inalienable, and is excluded from the property which is to vest in the receiver in insolvency. Even if s. 53 of the Bankruptcy Act, 1883, does give jurisdiction to make an order with respect to such a pension, no such order ought to be made in such a case as the present: *Lucas* v. *Harris*. (2) The judgment of Lindley L.J. in that case shews conclusively that no such order ought to be made, for there is no statute compelling the Court to make such an order, and the effect of making it would inevitably be to defeat the clearly expressed object and intention of the Indian legislature.

Herbert Reed, Q.C. (*Carrington* with him), for the trustee. The order was rightly made. The Indian Acts can have no

(1) By the Pensions Act, 1871 (Indian Act No. XXIII.), s. 11, "No pension granted or continued by Government . . . on account of past services, . . . and no money due or to become due on account of any such pension, shall be liable to seizure, attachment, or sequestration, by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court."

By s. 12, "All assignments, agreements, orders, sales, and securities, of every kind, made by the person entitled to any pension . . . mentioned in s. 11, in respect of any money not payable at or before the making thereof, on account of any such pension . . . or for giving or assigning any future interest therein, are null and void."

Sect. 266 of the Indian Code of Civil Procedure, which deals with attachment of property, contains the following first proviso: "Provided that the following particulars shall not be liable to such attachment or sale, namely . . . (*g*) stipends and gratuities allowed to military and civil pensioners of Government, and political pensions."

Sect. 351 gives power to make orders declaring persons to be insolvent, and appointing receivers of their property.

By s. 354, "Every order under s. 351 . . . shall operate to vest in the receiver all the insolvent's property, except the particulars specified in the first proviso to s. 266."

(2) 18 Q. B. D. 127.

operation in this country. Sect. 53 of the Bankruptcy Act, 1883, clearly gives jurisdiction to deal with this pension, for the words are "any half-pay or pension." Pensions which are declared to be inalienable might have been excepted from the operation of the section, but have not been so excepted. The reasons given by Lindley L.J. in *Lucas* v. *Harris* (1) were not necessary for the decision of that case. The effect of the appellant's contention would be to read words into s. 53.

[KENNEDY J. referred to *Gathercole* v. *Smith.* (2)]

[The following authorities were also referred to in the course of the argument: *Dent* v. *Dent* (3); *Ex parte Hawker, In re Keely* (4); *Ex parte Huggins, In re Huggins* (5); *Birch* v. *Birch* (6); *Ex parte Webber, In re Webber* (7); *Crowe* v. *Price* (8); *In re Shine, Ex parte Shine.* (9)]

VAUGHAN WILLIAMS J. This case presents some difficulty, but I have come to the conclusion that the decision of the county court judge was wrong, and ought to be reversed. It is clear that there is a general discretion as to all cases of this character. Mr. Muir Mackenzie contended that there was no jurisdiction to make any order. I cannot assent to that argument. Then he further contended that there was no jurisdiction to make an order in this particular case, because the pension in this case would not vest in the trustee in bankruptcy. I will assume for the purpose of argument that he is right in his contention that, in this particular case, the pension would not vest in the trustee; but that does not exclude the operation of s. 53 of the Bankruptcy Act, 1883, for that section does apply to pensions which would not vest in the trustee because they have been made inalienable. The pension in the present case was granted under the Indian statutes. The only question which we have to decide here is, whether the Courts administering the law of bankruptcy in this country ought to apply s. 53

(1) 18 Q. B. D. 127.
(2) 17 Ch. D. 1.
(3) L. R. 1 P. & M. 366.
(4) L. R. 7 Ch. 214.
(5) 21 Ch. D. 85.
(6) 8 P. D. 163.
(7) 18 Q. B. D. 111.
(8) 22 Q. B. D. 429.
(9) [1892] 1 Q. B. 522.

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Vaughan Williams J.

of the Bankruptcy Act, 1883, in respect of such a pension or not. In my opinion the Courts ought not, with regard to an Indian pension, to make any order under s. 53, although undoubtedly there is jurisdiction to make an order. The matter is not without authority. In *Lucas* v. *Harris* (1) Lindley L.J. said: "But the Indian Acts create the pensions and determine their nature, and the Courts of this country ought not, I think, to make an order which, if operative, will defeat the objects of the Indian legislature, unless the law of this country is such as to compel the Courts so to do." (2) In order to understand that decision properly we must look at the Indian statutes. By the Code of Civil Procedure all the property of an insolvent vests in the receiver, except certain specified property, including pensions. Sect. 354 provides that "every order under s. 351" (that is, orders declaring persons to be insolvent, and appointing receivers of their property) . . . "shall operate to vest in the receiver all the insolvent's property, except the particulars specified in the first proviso to s. 266." Sect. 266 deals with attachment of property, and the first proviso is as follows: "Provided that the following particulars shall not be liable to such attachment or sale, namely . . . (*g*) stipends allowed to military and civil pensioners of Government, and political pensions." These provisions shew that by the Indian legislation not only is a pension inalienable, but, if the holder of a pension becomes insolvent in India, his pension is expressly excepted from the property that is to vest in the receiver. When one has to consider the question whether an order under s. 53 of the Bankruptcy Act, 1883, would defeat the intention of the Indian legislature, one ought to take into consideration the provisions which I have read, shewing that the Indian legislature did not intend that a pension should be part of the property divisible among the creditors of the holder if he becomes insolvent. In *Lucas* v. *Harris* (1) the Court of Appeal held that the pension of an officer of Her Majesty's forces, being, by s. 141 of the Army Act, 1881 (44 & 45 Vict. c. 58), made inalienable by the voluntary act of the person entitled to it, could not be taken in execution, and an order appointing a receiver of such a pension

(1) 18 Q. B. D. 127. (2) 18 Q. B. D. at pp. 134, 135.

was bad. In that case Lindley L.J., after dealing with the question of the construction of s. 141 of the Army Act, 1881, continues as follows: "By the Indian Pensions Act, 1871, ss. 11 and 12, the pensions of the defendants are expressly made not assignable; nor can they be in any manner taken in execution in India. The Indian Act does not, of course, say that they cannot be attached or taken in execution out of India; the Indian Government only legislating for its own dominions. But it is obvious that the whole object of the Indian legislature, which has authorized the payment of these pensions, was to prevent them from being dealt with by, or taken from, the officers to whom they were granted; and it is also obvious that this object would be defeated if the order appealed from were to stand, and were to be recognised and carried out by the Secretary of State for India. These Indian enactments alone may not of themselves be sufficient to render these pensions incapable of being attached, sequestered, or otherwise reached by legal process in this country." (1) Up to this point the Lord Justice is dealing only with the nature of the pension, and it is clear that his view is that the Courts can always exercise a discretion as to dealing with pensions. But then follows the passage which I have already read from his judgment, in which he lays it down that such discretion ought not to be exercised for the purpose of defeating the intention of the Indian legislature. That is a positive decision, and seems to me to be directly in point in the present case. Lord Esher M.R. in that case expressed his agreement with the judgments of Lindley and Lopes L.JJ. At first I experienced some difficulty as to the effect of the final passage of his judgment, but I think the true meaning is that which Kennedy J. attributes to it.

For these reasons I am of opinion that the decision of the county court judge ought to be reversed.

KENNEDY J. I agree, and will only add a few words as to the judgment of the Master of the Rolls in *Lucas* v. *Harris*. (2) He says: "I think it better to give no opinion whatever upon the points taken in argument with respect to the effect of the

(1) 18 Q. B. D. at p. 134. (2) 18 Q. B. D. 127.

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Bankruptcy Act." (1) He appears in that passage to refer to the particular line of argument put forward at p. 129 of the report, which is based in part on the distinction between two classes of pensions, those given for past services only, and those given where the holder may be called upon to serve again. The counsel for the plaintiff in that case put their contention as to the effect of the Bankruptcy Act in the following terms: "The pension is not exempt from indirect assignment, for it would vest in a trustee in bankruptcy as 'property' of the bankrupt: *Ex parte Huggins.*" (2) It seems to me that it is in reference to that argument that the Master of the Rolls says he thinks it better to give no opinion. The validity of that argument depends on whether the pension in that case would be the property of the bankrupt, so as to pass to his trustee. Here the pension clearly would not pass to the receiver under an insolvency in India, but it comes within s. 53 of the Bankruptcy Act, 1883. We think that the discretion should not be exercised by making an order under that section.

Appeal allowed.

Solicitor for appellant: *George Twynam.*

Solicitors for respondent: *Ashurst, Morris, Crisp & Co.*

(1) 18 Q. B. D. at p. 139. (2) 21 Ch. D. 85.

P. B. H.

THE QUEEN *v.* THE COMMISSIONERS OF TAXES FOR THE BARSTAPLE DIVISION OF ESSEX.

1895
May 21.

Tithes—Income Tax—Assessment for Occupation of Lands—Reduction by Commissioners—Owner of Tithe Rent-charge—Right of Appeal—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Sched. B.—Tithe Act*, 1891 (54 & 55 *Vict. c.* 8), *s.* 8, *sub-ss.* 1, 3.

Sect. 8, sub-s. 3, of the Tithe Act, 1891, which gives the owner of tithe rent-charge the same right of appeal as the owner of lands, gives a right of appeal to the owner of tithe rent-charge where the assessment on land made by the surveyor for the purpose of Schedule B to the Income Tax Act, 1853, has been reduced by the Commissioners, on appeal by the occupier of the land, to such an extent that the tithe rent-charge exceeds two-thirds of the annual value of the land, as ascertained by the assessment, in consequence of which so much of the tithe rent-charge as is equal to the excess is liable to be remitted under sub-s. 1.

An order nisi had been granted for a mandamus to the Commissioners of Taxes for the Barstaple division of the county of Essex, directing them to hear and determine the appeal of the Rev. E. P. Gibson, the rector of the parish of Ramsden Bellhouse, against the assessment, under Schedule B of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), of certain lands in that parish. Mr. Helsham Jones, being both the owner and occupier of the lands in question, was assessed in respect of such lands, for the purpose of Schedules A and B of the Income Tax Act, 1853, by the surveyor. He appealed to the Commissioners, who reduced the assessments. (1) The Rev. E. P. Gibson, the rector, was the owner of the tithe rent-charge issuing out of the lands. Notice was not given to him of the appeal by the owner and occupier of the lands to the Commissioners, and he was not aware of such appeal until after it had been heard and determined. He desired to question by way of appeal the reduction of the assessment for the purpose of Schedule B to the Income Tax Act, 1853, on the ground that, by reason of the provisions of the Tithe Act, 1891

(1) As to appeals against assessments, see the Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 80, 82, and the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57.

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(54 & 55 Vict. c. 8), s. 8, sub-s. 1 (1), his interest as owner of the tithe rent-charge was affected, and he claimed to be entitled to appeal by virtue of sub-s. 3 of the same section. (2)

The Commissioners were of opinion that he had no right of appeal, and that they had no jurisdiction to hear the appeal, and refused to hear it.

Lawson Walton, Q.C. (*J. C. Earle* with him), for the Commissioners, shewed cause. The Commissioners were right in holding that they had no jurisdiction to hear this appeal. They had already decided the question now sought to be raised on the appeal of the occupier. The owner of the tithe rent-charge seeks to appeal, not from the surveyor to the Commissioners, which is the appeal given by the statutes, but from the Commissioners to themselves. It is expressly provided by the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57, sub-s. 10, that "Appeals once determined by the General Commissioners . . . . shall be final." The owner of the tithe rent-charge is not a person aggrieved, and has no right of appeal. To give him a right of appeal would cause injustice to the occupier.

Channell, Q.C. (*Stevenson Moore* with him), in support of the order nisi. The provisions of s. 8, sub-s. 1, of the Tithe Act, 1891, shew that the interest of the owner of the tithe rent-charge may be affected by the reduction of the occupier's assessment. He is therefore aggrieved, and is entitled to appeal. His interest, however, was not affected until the Commissioners had reduced the assessment, and his appeal must be taken to be an

(1) By 54 & 55 Vict. c. 8, s. 8, sub-s. 1, "Where a sum is claimed on account of tithe rent-charge issuing out of any lands, and the county court is satisfied that, if the sum claimed is paid, the total amount paid on account of the tithe rent-charge for the period of twelve months next preceding the day on which the sum claimed became payable, will exceed two-thirds of the annual value of the lands, as ascertained and entered in the assessment for the purpose of Schedule B to the Income Tax Act, 1853, ... the Court shall order the remission of so much, whether the whole or part of the sum claimed, as is equal to the excess, and the amount so ordered to be remitted shall not be recoverable."

(2) By sub-s. 3, "For the purposes of this section the owner of tithe rent-charge shall have the same right of appeal as the owner of lands, whether under the enactments relating to the said assessment or under this section."

appeal against the assessment as made by the surveyor and altered by the Commissioners. If there is any inconsistency between s. 57, sub-s. 10, of the Taxes Management Act, 1880, and s. 8, sub-s. 3, of the Tithe Act, 1891, the later Act must prevail.

GRANTHAM J. This is a somewhat complicated case. We find that a difficulty arose from the fact that the owner of the tithe rent-charge was unaware of the appeal to the Commissioners brought by the owner and occupier of the land, and it is said that the determination of the Commissioners is final. But it now appears that the owner of the tithe rent-charge did give notice of appeal in time. The Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 8, sub-s. 3, gives him a right of appeal if he gives his notice in time, and the only difficulty is as to the question whether the Commissioners, having already decided on the appeal by the owner and occupier of the land, can afterwards hear an appeal by the owner of the tithe rent-charge. I have no doubt that s. 8, sub-s. 3, gives the owner of the tithe rent-charge a right to demand an appeal, and gives the Commissioners a right to hear such appeal. The order nisi must therefore be made absolute.

WRIGHT J. The land was assessed by the surveyor for the purpose of Schedules A and B to the Income Tax Act, 1853. Then there was an appeal by the owner and occupier of the land, and the assessments were reduced. Then, in consequence of the provisions of s. 8, sub-s. 1, of the Tithe Act, 1891, it is apprehended that if the occupier of the land is able to shew that the amount claimed on account of tithe rent-charge will exceed two thirds of the annual value of the lands, as ascertained by the decision of the Commissioners on appeal, the amount of tithe rent-charge will be reduced. The Commissioners thought that they had no power to hear an appeal by the owner of the tithe rent-charge, and the question for our determination is whether s. 8, sub-s. 3, of the Tithe Act, 1891, gives them power to hear such an appeal. I find it somewhat difficult to get over the language of the statutes so as to give the owner of the tithe

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Wright, J.

rent-charge in the present case the right of appeal which he claims; but, on the whole, I think that the appeal must be dealt with as if the assessment of which the owner of the tithe rent-charge complains, although it was in fact made by the Commissioners, had been made by the surveyor. I also think that the right of appeal ought to be allowed on the ground that (although owing to no fault on the part of the Commissioners) the proceedings on the previous appeal were not conducted according to the principles of natural justice, so far as the owner of the tithe rent-charge was concerned, because he had no notice. I think that the owner and occupier of the land ought to have notice of the rehearing.

Order absolute.

Solicitor for the owner of the tithe rent-charge: *E. W. I. Peterson.*

Solicitors for the Commissioners: *E. F. & H. Landon.*

P. B. K.

C. A.

1895

May 11, 27.

[IN THE COURT OF APPEAL.]

BROWN, JANSON & CO. *v.* A. HUTCHINSON & CO. AND ANOTHER.

Partnership—Partner's separate Judgment Debt—Charging Order upon Share of Partner—Right to Account—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 23, 31.

As a general rule the remedies of a separate judgment creditor of a partner, in whose favour an order has been made charging the judgment debt on that partner's interest in the partnership under s. 23, sub-s. 2, of the Partnership Act, 1890, are only such as he would have had if the charge had been made by the partner; and, therefore, in the absence of special circumstances, he cannot during the continuance of the partnership obtain an order under that sub-section directing the other partners to render to him accounts of the partnership transactions.

APPEAL from order of Day J. at chambers.

The facts were as follows.

The plaintiffs brought an action against J. A. Hutchinson as the drawer and the firm of A. Hutchinson & Co., of which he

was a member, as the acceptors of a bill of exchange for 3000*l*. It appeared that the firm of A. Hutchinson & Co. was constituted a société en commandite according to the law of France for the manufacture and sale of indiarubber goods, and that its registered office was in Paris; but that it had a branch office in London for the sale of the goods manufactured. The bill was accepted by J. A. Hutchinson on behalf of the firm. The plaintiffs obtained judgment in the action against the defendant J. A. Hutchinson under Order XIV.; but the defendants A. Hutchinson & Co. obtained leave to defend on the ground that the defendant J. A. Hutchinson had no authority to accept the bill for the firm. The action as against the firm was still pending. The plaintiffs obtained an order under s. 23 of the Partnership Act, 1890, charging the interest of the defendant J. A. Hutchinson in the partnership business with the amount of the judgment debt, and appointing a receiver of that interest. This order was appealed against and affirmed by the Court of Appeal. (1) They then applied for and obtained the order appealed against, which directed the defendants A. Hutchinson & Co. to deliver to the plaintiffs within one month or such extended time as might be allowed by the judge an account of the share of profits of the defendant J. A. Hutchinson in the partnership of the defendants A. Hutchinson & Co., whether already declared or accruing to him in respect of the said partnership, and of any other money which might be coming to him in respect of the said partnership; and that the said defendants A. Hutchinson & Co. should forthwith pay the profits and moneys found to be due to the said J. A. Hutchinson to the receiver appointed as before mentioned. The defendants A. Hutchinson & Co. appealed against this order. (2)

(1) See [1895] 1 Q. B. 737.

(2) By the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23, "(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm. (2.) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already

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McCall, Q.C., and *H. Tindal Atkinson*, for the defendants A. Hutchinson & Co. There was no jurisdiction to make this order. For convenience the rules allow the drawer and the acceptor of a bill of exchange to be sued by one writ; but the action must be treated for this purpose as two actions—one against the drawer, the other against the acceptors. If separate actions had been brought, how could there be jurisdiction in the action against the drawer to make such an order as this against the defendants in the other action? Unless jurisdiction is given by the Partnership Act, 1890, there can be none. The question depends on s. 23 of the Act. The effect of sub-s. 2 of that section is to give to the judgment creditor of a partner the same rights as if a charge in respect of the judgment debt had been given to him by the partner upon his share in the partnership. By s. 31 of the Act an assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to require any accounts of the partnership transactions. The judgment creditor cannot be placed in a better position than the

declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given, if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require. (3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same."

Sect. 31: "(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. (2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

judgment debtor. The judgment debtor could not during the continuance of the partnership compel the other partners to render such an account as is here ordered. Assuming that such an order could be made in the case of an English firm, it cannot be made in the case of a foreign firm the rights of the partners in which are governed by foreign law. [They cited Lindley on Partnership, 6th ed. p. 364.]

Witt, Q.C., and *Bartley Denniss*, for the plaintiffs. The terms of s. 23, sub-s. 2, of the Partnership Act, 1890, do not limit the jurisdiction to direct accounts to cases in which a mortgagee or assignee would be entitled to them under s. 31. The Court may direct all accounts and inquiries "which the circumstances of the case may require." The contention for the appellants gives no effect to those words. By the 1st sub-section of s. 23 the previously existing right to seize the partnership property in execution is taken away. It is to be presumed that some effective substitute for it would be given by the Act. To construe the 2nd sub-section as giving jurisdiction only to order an account as against the judgment debtor is to give it no effect at all, for there would be power under Order XLII., r. 32, to examine him as to his property or means of satisfying the judgment. Unless an account can be ordered as against the other partners the appointment of a receiver is ineffective. It would appear from what Lindley L.J. said in giving judgment in *Brown, Janson & Co.* v. *A. Hutchinson & Co.* (1), that he thought that there was power to make such an order as this. He points out that there is no grievance to the solvent partners, and that by s. 33, sub-s. 2, they can dissolve the partnership if one partner allows his share of the partnership property to be charged under the Act for his separate debt. [They cited *Whetham* v. *Davey* (2); *Redmayne* v. *Forster*. (3)]

McCall, Q.C., in reply, cited *Irwell* v. *Eden*. (4)

Cur. adv. vult.

May 27. LOPES L.J. read the following judgment:—The facts in this case are as follows. The plaintiffs brought an action

(1) [1895] 1 Q. B. 737.
(2) 30 Ch. D. 574.
(3) L. R. 2 Eq. 467.
(4) 18 Q. B. D. 588.

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against J. A. Hutchinson and the firm of Hutchinson & Co., of which he was a member, upon a bill of exchange for 3000*l.*, drawn by J. A. Hutchinson upon and accepted by the firm, and they obtained judgment against J. A. Hutchinson under Order XIV. for 3034*l.* 17*s.*, leave being granted to the firm to defend the action.

The plaintiffs then applied by summons under s. 23 of the Partnership Act, 1890, for an order charging the interest of J. A. Hutchinson in the partnership business with the amount of the judgment debt and for the appointment of a receiver of his said partnership interest. This order was made and was affirmed by the Court of Appeal. Subsequently the learned judge at chambers ordered the defendants A. Hutchinson & Co. to deliver to the plaintiffs an account of the share of profits of the defendant J. A. Hutchinson in the partnership of the defendants A. Hutchinson & Co. This is the order appealed against.

It is said that there was no jurisdiction to make this order. The question depends on the latter part of sub-s. 2 of s. 23 of the Partnership Act, 1890. The object of this section is to get rid of the cumbrous and inconvenient mode by which partnership property was taken in execution for a partner's separate debt. A fi. fa. founded on a judgment obtained against one partner can no longer be executed against the goods of the firm, but, as in the case of public companies, a separate judgment creditor of a partner can obtain an order charging his interest in the partnership assets with the payment of the judgment debt, and the charge can be enforced by a sale or the appointment of a receiver. At the end of the section are these words: "And direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require." Having regard to the words "or which the circumstances of the case may require," I am of opinion that there is a jurisdiction to direct accounts—a jurisdiction to be exercised at the discretion of the judge, but a jurisdiction which ought never to be exercised except in special circumstances, as, for instance, with a view to a dissolution

rendered necessary either by the conduct of the partners or at their request. I find no such special circumstances in this case. The appeal must be allowed with costs.

RIGBY L.J. I am of the same opinion. This case depends upon s. 23, sub-s. 2, of the Partnership Act, 1890. The latter part of that sub-section provides that the Court or a judge may "direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require." Reading the sub-section with s. 31, sub-s. 1, which provides that an assignment by a partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to require any accounts of the partnership transactions, I think it plain that the intention of the legislature was that, under ordinary circumstances, in dealing with a case under sub-s. 2 of s. 23, the analogy of an assignment by a partner of his share should be adhered to. In order to get rid of such inconveniences as arose under the old law in cases where the partnership property was seized to satisfy the separate judgment debt of one of the partners, it is provided by s. 33, sub-s. 2, that a partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under the Act for his separate debt. That provision is, of course, only applicable to English partnerships; and whether there is in this case an English partnership as well as the French partnership, or, if not, what the French law on the subject under such circumstances may be, we are not in a position to say. It seems to me that the words at the end of sub-s. 2 must be taken as meaning that primâ facie the judgment creditor who has obtained a charging order under that sub-section shall have such remedies as a person would have in whose favour a charge had been made by a partner upon his share in the partnership; and that by so reading them we are not depriving such a judgment creditor of any right which he would have had under the law as it

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previously existed. Treating that as being the general rule laid down by the sub-section, what then is the meaning of the concluding words of the sub-section, "or which the circumstances of the case may require"? I do not look upon those words as having no effective meaning. I think that they recognise that the analogy of an assignment of a share in the partnership by a partner might not in all cases afford the rule which is to be acted upon under the new law. But I cannot think that the previous words referring to the remedies given to an assignee by way of charge were inserted without reason, as would be the case according to the wide construction of the sub-section contended for by the plaintiffs. I think they were inserted as an instruction with regard to the rule to be acted on in ordinary cases, and that the concluding words were added to give under special circumstances a wider jurisdiction to direct accounts than would have existed in the case of an assignee; and what the special circumstances so contemplated may be it seems to me unnecessary for the purposes of the present case to endeavour to define, for, when I look at the facts, I cannot find any special circumstances whatever to take the case out of the ordinary rule indicated by the sub-section. I do not think that in a case like the present the legislature ever intended that an account should be directed as against the other partners during the continuance of the partnership. I therefore agree with my brother Lopes that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Hays, Schmettau, & Ancrum.*
Solicitors for defendants A. Hutchinson & Co: *Montagu & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1895 May 1.

DODDS, Appellant;
THE ASSESSMENT COMMITTEE OF THE POOR LAW UNION OF SOUTH SHIELDS, Respondents.

Poor-rate—Rateable Value—Public-house—Evidence of Weekly Takings.
6 & 7 *Wm.* 4, *c.* 96, *s.* 1.

On appeal against the valuation of a public-house, situated in a town where there were other public-houses of a similar character, the assessment committee desired to prove, by cross-examination of the appellant's witnesses and by other evidence, what were the average weekly takings. The Court of Quarter Sessions rejected the evidence so tendered. On a case stated :—

Held, affirming the judgment of the Divisional Court, that, as there was nothing exceptional in the case of a public-house so situated, the ordinary mode of arriving at the rateable value should be adopted, and that the evidence was inadmissible.

Appeal from a judgment of the Queen's Bench Division on a case stated at quarter sessions.

The appellant was rated as the occupier of a public-house called the Wheat Sheaf Inn, in the parish of Westoe in the borough of South Shields, of which he was tenant from year to year at an annual rental of 315*l.* 10*s.*, and in respect of which he was assessed at 500*l.* for gross estimated rental, and 416*l.* 10*s.* for rateable value.

The ground of appeal was that the appellant's premises were overrated.

At the hearing of the appeal the respondents' counsel proposed, by cross-examination of the appellant's witnesses and by examination in chief of the respondents' witnesses, to give evidence of the amount of the average weekly takings of the appellant in his public-house. The appellant's counsel objected to the reception of evidence of that kind, and the objection was allowed and the evidence was rejected.

The question for the Court was whether the evidence tendered was rightly rejected.

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The Divisional Court (Wills and Wright JJ.) affirmed the decision of the Court of Quarter Sessions.

The assessment committee appealed.

Balfour Browne, Q.C., and *R. Cunningham Glen*, for the assessment committee, in support of the appeal. The evidence was wrongly rejected. The assessment committee are not attempting to make profits a test of what is the rateable value, but they desire to ascertain the gross earnings so as to be able to see whether the rateable value of the house is properly represented by the rent paid. The case of a public-house is exceptional, because there are other considerations besides rent, such, for instance, as the common undertaking entered into in the case of tied houses. If the gross earnings are known, the working and other expenses and tenant's profits can be deducted, and the balance will represent the rent that a tenant would pay. This is a case in which there is no open market from which the value can be ascertained, and, therefore, recourse must be had to the earnings: *Reg.* v. *Verrall* (1); *Clark* v. *Fisherton-Angar.* (2)

[They referred also to *Reg.* v. *London and North Western Ry. Co.* (3) and *Mersey Docks* v. *Liverpool.* (4)]

Lawson Walton, Q.C., and *J. Strachan*, for the appellant. There is nothing exceptional in the case of a public-house. The value can be ascertained in the ordinary manner by the evidence of experts, and, that being so, there is no occasion to refer to the earnings, and the question of the amount of such earnings cannot be gone into.

Balfour Browne, Q.C., in reply.

LORD ESHER M.R. I am of opinion that the decision of the Divisional Court in this case is right. The question before the assessment committee and before the quarter sessions, which is what we have to deal with, was, What was the rateable value of a certain public-house in South Shields? The rateable value is to be found according to the method pointed out by the Act of Parliament; that is to say, it is to be ascertained by the rent which an hypothetical tenant—that is, an ordinary person or

(1) 1 Q. B. D. 9.
(2) 6 Q. B. D. 139.
(3) L. R. 9 Q. B. 134.
(4) L. R. 9 Q. B. 84.

tenant—would give for the premises. The question, according to the Act, is, not what rent he could afford to give, but what rent an ordinary tenant would give—that is, what he would be likely to give.

Now, what is the ordinary mode of finding out what a tenant would give as rent for premises? The question is not what a tenant would give for the business carried on in the house or tenement, it is what he would give by way of rent for the house or tenement itself. There is a well known and established mode of determining that question, and it is obviously the best mode where it can be adopted. The question is not what the tenant of the premises is actually paying, though that may be a circumstance to be inquired into. The tenant may be paying far more than an ordinary tenant would give, or he may be paying much less. It is obvious that, given the nature of the business, the mode in which the building is built, and its position in a particular part of the district or town, one man using these premises for a particular business might make it a very paying business, and another man, using the same premises, might make his business a total failure; but that cannot be the test as to what an ordinary tenant would give as rent for the premises. An ordinary tenant would carry on his business with ordinary skill and care: and if two men with the same ordinary skill and care were carrying on business in the same premises in the same position, the probability is that they would be carrying it on with as nearly as possible the same result. To inquire what a particular tenant has given, or what another particular tenant might give, would be to go into a question which is really immaterial, because it is not the proper one by which to determine the only question which has to be determined, and that is, what an ordinary tenant would give. Therefore it is admitted that, in dealing with inhabited houses or ordinary business premises, the mode of determining the question is by inquiring what rent is given for similar premises in similar positions in the same place.

Now that is the general rule, though the amount of profit that a man is making or the amount of his gross profits in his business would be questions which might be not immaterial if

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the inquiry were what could a tenant afford to give; but where the inquiry is what a tenant is likely to give, the question either of his gross earnings or of his net earnings or of his profits is, and must be, wholly immaterial; and it is in fact mischievous and oppressive. So that such evidence, where you can get the ordinary evidence, ought to be rejected, not only on the ground that it is immaterial, but also on the ground that to allow it would be oppressive and unfair.

That principle is admitted in ordinary cases; but it is said there are exceptional cases, in which it is necessary to go into takings. The leading case upon all these matters is *Mersey Docks* v. *Liverpool* (1), and the judgment of Blackburn J. in that case is, and has always been held to be, the foundation of all the subsequent decisions upon this matter. In that case it seems to me that it is distinctly laid down that in ordinary cases such questions as to the gross receipts, or the net receipts or the profits, cannot be asked. He gives the instances of a shop in Cheapside, and of chambers in the Inns of Court, to shew that in those cases this question of profits, or of the gross earnings or net earnings, is immaterial. But he says there are exceptional cases, and the one before him—the case of what was the rateable value of the Liverpool Docks—was an exceptional case, because there was nothing to compare it with: there were no other docks in the same position, and there were particular Acts of Parliament which were applicable to the Liverpool Docks, and therefore it was not possible to get at what a tenant, if they were put into the market, would give for them. That is an exceptional case, and it became necessary, as a step to deciding what a tenant would give, to find out what he could afford to give. It is not said that the rateable value is to be what a tenant could afford to give, but that in order to find out what, in such a case as that, he would give, the ordinary means are not available, and therefore it is necessary to find out what the tenant could afford to give. What was said in that case is applicable to the case of a race-course. That is an exceptional case, and therefore it is necessary to inquire what the tenant of the race-course, intending to use it as a race-course, could afford to give, in order to find out

(1) L. R. 9 Q. B. 84.

what he would be likely to give. A race-course cannot be put into the same category with inhabited houses.

There was another case—that of refreshment rooms at a railway station. It is obvious that that comes within the same category of being an exceptional case. It was admitted that unless this case of a public-house was an exceptional case such as those which have just been mentioned, the question ought not to be allowed, because it is immaterial and would raise a false issue, and be oppressive and unfair.

Now, what is there exceptional in the case of a public-house in a large town? There may be some public-house or some hotel in exceptional circumstances, because I am not going to say there is not; but the question which we are asked is with regard to a public-house in a town where there are many other public-houses. If people accustomed to South Shields can give evidence which can be relied on as to what is the rent in the house-market of public-houses similarly situated, similarly built, and of the same size, it seems to me that the ordinary rule can be applied, although the houses are licensed.

Then it is said that some of the public-houses in South Shields are tied public-houses, as it is called. Here again, if there is one tied public-house there are many; and what difficulty can arise in the case of tied public-houses any more than when the houses are free, I cannot see. I think, therefore, the same rule applies whether they are tied houses or not. The case of the *Mersey Docks* v. *Liverpool* (1) is the real foundation of all the law in these cases, and I only venture to say, with regard to one case that has been cited to us, which is the case of *Clark* v. *Fisherton-Angar* (2), that I do not understand it; and if I do not understand a case I really do not know how to act upon it. It seems to me that if it is consistent with the case of the *Mersey Docks* v. *Liverpool* (1) and the doctrine there laid down, it carries us no further. If it is inconsistent with it, I am prepared wholly to disagree with it. I think this appeal must be dismissed.

A. L. SMITH L.J. In my judgment this is an attempt to incorporate into the ascertainment of the rateable value of a

(1) L. R. 9 Q. B. 84. (2) 6 Q. B. D. 139.

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public-house, certain exceptions which have been allowed to be incorporated into the ascertainment of the rateable value of certain specified hereditaments which I will deal with in a moment. This case arises on a very simple set of facts. A publican in South Shields has a public-house for which he pays a rent of 315*l.* 10*s.* a year; and the assessment committee put him up to a rateable value of 416*l.* 10*s.* The publican went to quarter sessions on appeal against this decision of the assessment committee for the purpose of shewing that the 315*l.* 10*s.* was the right rateable value upon which the rate should be assessed, and he was there with his experts and surveyors in that behalf. The assessment committee were seeking to establish what was the rateable value of this public-house, by endeavouring to shew what were the profits made by this tenant in that public-house. This was objected to, and the objection was allowed, and the evidence was shut out. Hence the appeal to this Court as to whether this was relevant evidence to the issue which was then to be determined by the Court of Quarter Sessions.

I understand the law to be that where there is a tenement—whether it has a licence or not seems to me to be immaterial—and it is desired to ascertain the rateable value of that tenement, and there are other similar tenements, I do not say like tenements but similar tenements, with which a comparison may be made, general evidence of experts as to the market value of the house is legitimate evidence. The real basis upon which the rateable value is to be ascertained is, by finding out what is the market value to a tenant from year to year of the tenement. I agree that the position of the house, that it is in a front street, that it is a corner house, or that it is in any other good position, are matters to be taken into consideration; and the rent which a tenant from year to year would give for the premises is to be proved by calling experts who know the town and have had dealings in the letting of public-houses, whether tied or free, and from their knowledge and experience can say that with regard to the public-house which is the subject-matter of the inquiry, the rent which a tenant would give from year to year is such an amount. It is nihil ad rem in such a case whether the tenant has made 1000*l.* a year in the house, or whether he has lost

1000*l.* a year in the house. Take the case where a tenant has neglected his business or has not been otherwise successful and has lost 1000*l.* a year and is out of pocket. Is that house to be rated at nothing? As has been pointed out in the case of the *Mersey Docks* v. *Liverpool* (1), where you have what Blackburn J. called the higgling of the market, where you have a market value whereby a comparison can be made, profit or loss in trade have nothing whatever to do with the ascertainment of the rateable value of the hereditament.

Then it has been said that this is an exceptional case, and, therefore, the respondents are entitled to bring in those considerations which have been allowed in certain exceptional cases. Why is it an exceptional case? Inquiries have for years been going on in thousands of similar cases to ascertain the rateable value of public-houses with licences, and why is an exception to be made in this case? If it had been an exceptional case, then these authorities which were called to our attention, dealing as they did with a race-course and refreshment-rooms, would have been applicable. In such cases the annual value, as Blackburn J. points out, must be arrived at somehow, and the only way available is to take into consideration what profit the man would make out of the house, and from this to arrive, as best you can, at what a tenant from year to year would give. In the present case there is no foundation for saying that the ascertainment of the rateable value of this public-house is an exceptional case at all. It is a case of daily occurrence. It falls within the ordinary rule, and not within any exception, and, in my opinion, the chairman was quite right in allowing the objection. The Divisional Court was also right, and this appeal must be disallowed.

RIGBY L.J. I am of the same opinion. The only question raised by the case, and I have no doubt deliberately relied upon as the only ground for exceptional treatment, is this—whether the mere fact that the house is a licensed house takes it out of the general rule adopted for the purposes of assessment. The circumstances relied upon for the purpose of distinguishing this

(1) L. R. 9 Q. B. 84.

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public-house from any other, and all those suggestions about the differences between free and tied houses, are beside the mark. There may be differences, and no doubt there are. The experts are able to take those into consideration in giving an opinion of what the value of a particular licensed house may be as compared with other licensed houses; but not a suggestion was made of any distinction between this and any other property except that the licence is attached to it. I do not think the present case approximates to those which have been allowed as exceptional, because the general rule cannot by possibility be applied to them. What difficulty is there in applying the general rule here and comparing this public-house with any other public-houses in the same town, or perhaps in other towns, of a similar character? I can see none. I can see that the exceptions which have been allowed were so allowed on the ground of necessity. In such cases it is necessary to do something which is not pointed out in the Act, because the only alternative is that it would not be possible to assess these exceptional hereditaments. Something must be done which, apparently, was not contemplated by the Act, but which arises from the actual necessities of the case. It cannot be said that the mere granting of a licence to a public-house raises any such difficulty or affords any reason for an exceptional treatment of the case.

Appeal dismissed.

Solicitors for appellant: *Godden, Son & Holme, for Mabane & Graham, South Shields.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for Newlands & Newlands, Newcastle-on-Tyne.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1895
March 27.

THE MANSION HOUSE ASSOCIATION ON RAILWAY AND CANAL TRAFFIC FOR THE UNITED KINGDOM (INCORPORATED), APPLICANTS; THE GREAT WESTERN RAILWAY COMPANY, RESPONDENTS.

Railway—Railway and Canal Commissioners—Practice—Increase of Rates—Increase on Classes of Goods—Complaint by Association—Particulars—Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25), *ss.* 7, 31—*Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *ss.* 1, 2.

A complaint was made to the Railway and Canal Commissioners, by an association, certified under s. 7 of the Railway and Canal Traffic Act, 1888, that the rates on certain classes of goods, each class containing a large number of different articles, had been increased by the respondents, a railway company, since December 31, 1892, and that such increased rates were unreasonable. The respondents asked for particulars of, among other things, the names of the traders who were represented by the applicants, and of the traders in respect of whose traffic the complaint was made:—

Held, affirming the judgment of Collins J., that, the association and the railway company being the only parties to the litigation, the association could not be called on to give particulars of traders represented by them:

Held, also, that on such a complaint, as to the increase of rates on a class of goods, the railway company might, in the first place, justify generally the raising of the rate for the whole class, and that, therefore, a demand for particulars, for the purpose of the identification of specific goods in respect to which the increase of rate might be alleged to be unreasonable, was premature.

APPEAL from an order of Collins J., sitting in the Court of the Railway and Canal Commissioners, refusing an order for particulars.

The applicants were an Incorporated Association of Traders who had obtained a certificate from the Board of Trade under s. 7 of the Railway and Canal Traffic Act, 1888, that they were a proper body to make such complaints to the Railway and Canal Commissioners as the Commissioners have jurisdiction to determine. They preferred a complaint that the respondents—the Great Western Railway Company—had, since December 31, 1892, increased the rates and charges upon traffic passing between London and Bath. The increased charges alleged related to

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certain classes of goods, and were charged on all merchandise comprised in those classes except in instances where traffic was carried at special rates. Under the provisions of s. 1, sub-s. 3, of the Railway and Canal Traffic Act, 1894 (1), and of s. 31 of the Railway and Canal Traffic Act, 1888, the applicants made a complaint to the Board of Trade with respect to the increased rates and charges, but no settlement of the differences between the complainants and the respondent company was arrived at. The applicants accordingly preferred this complaint, alleging that the increased rates and charges were unreasonable, and praying for an order requiring the respondents to desist from charging such increased rates or charges.

The respondents applied to the registrar for an order for particulars, and, among other things, required the names of the traders who were represented by the applicants in respect of the complaints alleged in the application, or in respect of whose traffic the complaint set forth in the application was made. The registrar refused to make an order for these particulars, and, on appeal, the learned judge affirmed the decision of the registrar on the ground that the applicants were entitled to maintain

(1) 57 & 58 Vict. c. 54, s. 1: "(1.) Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within the limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament."

"(3.) The Railway and Canal Commissioners shall have jurisdiction to hear and determine any complaint with respect to such increase of rate or charge, but not until a complaint with respect thereto has been made to and considered by the Board of Trade under s. 31 of the Railway and Canal Traffic Act, 1888.

"(4.) Unless the Court shall before or at the hearing of the complaint otherwise order, a complainant to the Railway and Canal Commissioners under this section shall, before or within fourteen days after filing his complaint, pay to the railway company such sum in respect of any rate or charge complained of as would have been payable by him to them had the rate or charge immediately before the increase remained in force; or if that rate or charge is higher than the rate or charge in force on the last day of December, 1892, then such sum as would have been payable on the footing of the last-mentioned rate or charge; . . . . "

the application without proof that individual traders had been aggrieved, and the respondents were not in a position to demand the names of persons represented by the association, and, further, that it was open to the respondents in the first place to justify the rates charged on general grounds as applicable to a class of goods, and that, therefore, particulars as to the traders, from which particulars the rates complained of in regard to specific merchandise could be ascertained, was premature. The order was therefore refused.

The respondents appealed.

Sir R. Webster, Q.C., *Cripps*, Q.C. (*Moon*, with them), for the respondent company, in support of the appeal. The association has no right to complain except on behalf of some trader or traders, and the respondents are entitled to know who these persons are. The reason for giving authority to associations to make complaint is that they may take up and support proper complaints by persons aggrieved. This view is supported by the provisions of s. 1, sub-s. 4, of the Act of 1894. The matter complained of must be a specific rate, and not a mere general or paper rate dealing with a class of goods. Such classes contain a very large number of different articles of merchandise, and the respondents ought not to be called on to be prepared to justify under a general complaint the charge on hundreds of different articles. They must be entitled to know in respect of what articles the charge is said to be excessive, so that they may be able to justify such charges, and they will get this information if the names of the traders are supplied.

Cyril Dodd, Q.C. (*Balfour Browne*, Q.C., and *R. Whitehead*, with him), was not called on as to the names of the traders represented by the association. The rates are divided into classes, and primâ facie the articles in each class are treated as of the same nature so far as the carriage of them is concerned. The respondents have raised the rate on a class, and they must justify that under s. 1 of the Act of 1894. The complaint of the association is not merely on behalf of persons who may have sent some one or more of the articles included in a class, but on behalf of all who may wish to send any of the goods mentioned

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in that class—it is, in effect, a complaint in the interest of trade.

Sir R. Webster, Q.C., in reply.

LORD ESHER M.R. I think we must agree with Collins J. in this case on both points. We have to construe s. 7 of the Act of 1888, and we must see what, under that section, is the position of such an association as this, which is the complainant in the present case. "Any such association as may obtain a certificate from the Board of Trade that it is, in the opinion of the Board of Trade, a proper body to make such complaint, may make to the Commissioners any complaint which the Commissioners have jurisdiction to determine." In my opinion those words "which the Commissioners have jurisdiction to determine," apply to the subject-matter. If the subject-matter of the complaint is a subject-matter which the Commissioners have jurisdiction to determine, that is all that is necessary. For instance, they could not deal with a libel; but if the subject-matter is one which the Commissioners, upon the complaint of somebody, would have jurisdiction to determine, that is enough. Now, at the time that Act was passed, the Commissioners would have had no jurisdiction, as I understand it, to deal with a raising of the rates, if they were raised in respect of all persons, and, therefore, when that Act was passed the Commissioners could not have entertained this complaint, whether it was made by a particular individual or whether it was made by such an association as this. The next thing to be considered under s. 7 is this. With regard to anything which is a subject-matter over which the Commissioners have jurisdiction, such an association as this may make the complaint without proof that the association is aggrieved. It seems to me to follow that they may make the complaint without communication with any individual trader whatever. It is for the protection of all traders that they have this large authority, but they may act of their own accord if they think that what is done would be a grievance to the traders, although no trader has applied to them. If that be so, it follows that no particular trader is a party to this litigation, or to this complaint. The parties are those who complain and the railway company which

is the body complained of, and there are no other parties to the litigation. No particular trader is before the Court, and the Court cannot make an order on a particular trader to pay money into court, or to do anything when that trader is not before the Court at all. The whole of this dispute, when it arises, must be determined between the complainants and the railway company.

Now, what the Act of 1894 has done is to add to those matters over which the Commissioners had jurisdiction a new matter. They are to have jurisdiction where a railway rate is increased, although it is increased equally to everybody who comes under the rate. That is done in s. 1, sub-ss. 1 and 3, of the Act.

Then comes sub-s. 4. There is no doubt that sub-section has not distinctly dealt with the case of these associations which may complain without being aggrieved. It is quite impossible that they can be brought under sub-s. 4. They cannot pay to the railway company any sum in respect of any rate or charge complained of, since there never would have been a rate payable by them. The only common-sense way, therefore, to deal with that sub-section is to say that it applies where the complaint is by individual traders, and that it does not, because it cannot, apply to the case of complaints by these associations. The complaint here is made by the association, not acting on behalf of anybody, but acting on behalf of their own views, and there is nothing in sub-s. 4 of the Act of 1894 which can limit their authority or power to complain.

The association have here made a very large complaint. They have complained of one or more classes of things, and in those classes are a multitude of articles. The railway company have raised the rate in respect of the whole class. They might have raised the rate, as I apprehend, on some of those articles in the class, and not upon all, and if they acted in an ordinary fair business manner they ought to have looked into the question as to each of these articles before they raised the price of them all, and if they did, then they have under their hand the reasons why they raised the price of each particular article. It is suggested to us that they may justify this raising of these rates, as to all, for reasons which apply to all. If the Railway Commissioners are satisfied with that answer, then they would

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say that it was not unreasonable to have raised the rate upon every one of these articles on the grounds put forward. I rather think that, if that ground is taken, and the Railway Commissioners are satisfied with the reason given primâ facie for raising the rate on all, and if the complainants reply that there are exceptional cases where that reason ought not to apply, the burden would be shifted upon them to shew which are the special cases. At all events, on the present application that particulars of each article should be given, it seems to me that the complainants cannot fairly be called upon to select the articles, their real complaint being as to the raising of all and each; and, secondly, if we were to make the order it would be perfectly futile, because their particulars would be only a repetition of that which they have stated in their complaint. I think, therefore, that the learned judge was right in saying that, at this time and in the state of things now existing, he could not make the order. He was not called upon to make the order for either of the particulars that is asked for. Whether, as he says, there may not come a time during the litigation when he can see that particulars ought to be given, it is not for us to determine now. I think this appeal must be dismissed.

RIGBY L.J. I am of the same opinion, and I entirely agree with the reasons which have been given by the Master of the Rolls. Under these circumstances I shall not attempt to say anything on the construction of the Act of 1888, or add to the general observations that the Master of the Rolls has made.

I should like, however, to say one word with reference to the construction of the Act of 1894. That Act appears to have taken as a primâ facie maximum of rates and charges to be made by railway companies the point at which they were fixed on a particular day, December 31, 1892. It does not prohibit absolutely all increase, but it throws upon the railway company the duty of shewing that any increase, either made at the time of the passing of the Act or after the passing of the Act, was a reasonable increase; and then it provides, in sub-s. 2

of the 1st section of the Act, for maintaining evidence of all rates and charges as they stood, along with the conditions of transport, on December 31, 1892, and I apprehend that in that sub-section they are talking of the same rates and charges as are mentioned in the previous sub-section, and that it is no use calling those rates "paper" rates so as to get rid of them in that way. It may be perfectly easy to test whether the raising of all the rates upon a particular class is a reasonable one or not, and it may be easy or it may be impossible for the railway company to establish the point that the raising of all was reasonable. With reference to sub-s. 4, I think that the appellants really construe that, "No complaint shall be entertained unless there is or are a trader or traders who have to pay and have been called upon to pay larger rates." I do not so read it. The Court may make exceptions. It may do away altogether with sub-s. 4 by an order, and it may be that they would think that, where a complaint is made by one of the public bodies authorized to make complaints, that exception should not apply. But it may also be that, from the very terms of that sub-section, it is obvious that it is not intended to apply to a case where a public body makes a complaint. It is there supposed that there is a private individual who has had transactions with the railway; but there is nothing to shew that no case which does not fall within sub-s. 4 can fall within the other sub-sections. I do not think, upon the proper construction, that that was the meaning of the Acts of Parliament, and I agree with the Master of the Rolls that the appeal should be dismissed.

Cyril Dodd, Q.C., asked that the appeal should be dismissed with costs.

Cripps, Q.C., submitted that s. 2 of the Act of 1894 (1) would apply, and that, in an appeal from the Commissioners, no costs could be allowed.

(1) Railway and Canal Traffic Act, 1894, s. 2: "In proceedings before the Railway and Canal Commissioners, other than disputes between two or more companies, the Commissioners shall not have power to award costs on either side, unless they are of opinion that either the claim or the defence has been frivolous and vexatious."

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LORD ESHER M.R. The costs of appeal come under the ordinary rules of this Court. We could not deal with any costs as to matters that occurred before the Commissioners, but I think we must give the costs of the appeal.

Appeal dismissed with costs.

Solicitors for applicants: *Neish, Howell & Macfarlane.*
Solicitor for respondents: *R. R. Nelson.*

A. M.

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[IN THE COURT OF APPEAL.]

YORKSHIRE PROVIDENT LIFE ASSURANCE COMPANY *v.* GILBERT & RIVINGTON.

Practice—Discovery—Libel—Justification—Particulars—Inspection of Documents—Reduction of Damages—Order XXXVI., r. 37.

In an action for libel, if the defendant puts in a plea of justification and delivers particulars in support of his plea, the issues to be tried under that plea are limited to the matters referred to in the particulars; and the defendant can only obtain discovery of documents relating to those matters.

An action was brought by a life insurance company against the defendants for publishing a statement that the plaintiffs habitually refused to pay legal claims on their policies. The defendants pleaded justification, and delivered particulars of thirty claims which, they alleged, the plaintiffs had refused to pay. They also delivered, without leave, further particulars of other alleged misconduct of the plaintiffs in reduction of damages. The defendants then obtained an order for discovery of documents by the plaintiffs. The plaintiffs' officer scheduled the registers of policies and claims, but objected to permit their inspection, except so far as they related to the thirty claims mentioned in the particulars:—

Held, that the defendants' right of inspection was limited to the entries relating to the thirty claims mentioned in the particulars, and that their right was not enlarged by the particulars in reduction of damages.

APPEAL from an order of Day J. in chambers.

The action was brought against the defendants, who were the publishers of a newspaper dealing with matters connected with insurance, called *The Review*, for libel in an article reflecting on the plaintiffs, the Yorkshire Provident Life Assurance Company, and accusing them of dishonesty and refusing to pay claims of

assured persons on frivolous pretexts. The defendants paid 5*l.* into Court in satisfaction of damages; and pleaded that the statements in the article in question, so far as they were allegations of facts, were true in fact, and, so far as they were expressions of opinion, were made in good faith and without malice, and were privileged as relating to matters of public interest.

On January 7, 1895, the plaintiffs obtained an order on the defendants to furnish particulars on which they relied in support of their plea of justification; and thereupon the defendants delivered particulars setting out the cases of about thirty persons whose claims, as they alleged, the plaintiffs had refused to pay. They also delivered further particulars of alleged misconduct of the plaintiff company in dealing with shares and other matters in reduction of damages under Order XXXVI., r. 37, but without leave. The defendants having interrogated the plaintiffs as to documents, Mr. Clegg, the secretary of the plaintiff company, filed an affidavit in which he scheduled the shares register, the directors' minute-book, and the balance-sheets of the company, and also letters and documents relating to the claims of the thirty persons whose cases were mentioned in the particulars, and denied the possession of any other material documents. The defendants obtained several orders for further discovery as to documents, and further affidavits were filed by the secretary, and finally, on March 19, 1895, he filed an affidavit, which was his sixth, in which he, for the first time, scheduled the general register of policies and the claims register; but he objected to produce them, save as to the entries therein relating to the policies mentioned in the particulars of justification, on the ground that all other entries were irrelevant to the action, and consisted solely of entries for the private information of the plaintiff company and their directors and officers, relating to the general conduct and business of the company, and did not relate to the matters in question in this action.

The agent of the defendants called at the plaintiffs' office to inspect the documents; but the secretary refused to allow him to inspect any part of the register of policies or of the register of claims except the entries relating to the cases mentioned in the particulars of justification.

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The defendants took out a summons for further inspection, which was heard by Day J., who ordered the plaintiffs to allow the defendants to inspect the two books in question. The plaintiffs appealed.

Bigham, Q.C., and *Lush*, for the plaintiffs. The defendants are not entitled to a general inspection to enable them to search for materials to support their plea of justification.

[A. L. SMITH L.J. In *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1) it was held that the defendant was not entitled to an inspection of the plaintiffs' books for the purpose of proving a plea of justification in an action against him for libel.]

Lord Esher M.R. said the same thing in *Zierenberg* v. *Labouchere*. (2) If a person libels another and chooses to justify the libel, he has no right to fish about in that other person's books to enable him to justify the libel: *Hennessy* v. *Wright*. (3) It was never the practice formerly to allow discovery to a defendant in an action for libel: *Gourley* v. *Plimsoll*. (4)

Finlay, Q.C., and *S. Elliott*, for the defendants. It is not disputed that, according to the well-settled principle in actions of libel, inspection of the plaintiff's books could not be allowed to the defendant if he merely justified the libel in general terms. But the case is different where, as here, the defendant has delivered specific particulars. The order of Day J. was perfectly right in view of the fact that the plaintiffs' secretary had, in his first five affidavits, suppressed all mention of the general register of policies and the claims register. The defendants, in support of their plea of justification, rely on the cases already mentioned in the particulars delivered, and can furnish further instances if they can obtain inspection of the plaintiffs' books. Without looking at those books, it is impossible for the defendants to comply with the order of January 7, 1895, to set out all the cases on which they intend to rely. Although the secretary swears in his affidavit that the two books in question are not relevant, his oath is not conclusive against an order for produc-

(1) 4 H. & N. 146.
(2) [1893] 2 Q. B. 183, 188.
(3) 24 Q. B. D. 445, n.
(4) L. R. 8 C. P. 362.

tion, if the Court is satisfied in other respects that the books are relevant. Documents are material, within Order XXXI., r. 12—under which a party may apply for an order of discovery of documents relating to the matter in question—if it is not unreasonable to suppose that they contain information directly or indirectly enabling the party seeking discovery either to advance his own case or to damage that of his adversary: *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.* (1) The real ground of Day J.'s order was that, looking at the plaintiffs' course of conduct, the suspicion was strong that there were other entries in the two books relevant to the matters in question besides those which the plaintiffs allowed the defendants to inspect: *Attorney-General* v. *Emerson.* (2) Again, the further particulars in reduction of damages entitle the defendants to discovery as to other matters besides those mentioned in the former particulars.

Lush, in reply, referred to *Bewicke* v. *Graham* (3) and *Budden* v. *Wilkinson.* (4)

LINDLEY L.J. The case which is before us is not free from difficulty. It raises two questions—one is a question of form, and one is a question of substance, and both of them are important. It is an action for libel, the defendants have justified, and what they have justified amongst other things is the statement in the libel, which I read from the particulars, that "the plaintiff company habitually refuse to pay just and legal claims upon policies of insurance issued by the plaintiff company," and so on. Supposing that after that the defendants had merely sworn an ordinary affidavit of documents and of discovery, I should think the principle which was applied in the case of *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (5) and *Zierenberg* v. *Labouchere* (6) would protect the plaintiffs from having their books thrown open to the discovery of their opponents. Such a case would be what is called a fishing application, and would be discouraged and stopped. But here thirty particulars are

(1) 11 Q. B. D. 55, 62.
(2) 10 Q. B. D. 191.
(3) 7 Q. B. D. 400.
(4) [1893] 2 Q. B. 432.
(5) 4 H. & N. 146.
(6) [1893] 2 Q. B. 183.

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Lindley L.J.

delivered; they are delivered before there is any affidavit of documents. What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars—of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars. The defendants' right, then, is to have discovery of all matters relating to the questions in issue as narrowed by the particulars. I do not think in a libel action he is entitled to get anything more. Has he, then, had discovery of all those matters which are relevant to the issues which are thus limited? Now upon that there is no controversy, and it appears to me, therefore, that in substance Mr. Lush is right, and that the discovery made has been sufficient. I think it would be a very bad precedent to suggest that a person can simply by libelling another obtain access to all his books and see whether he can justify what he has said or not. I think it would be very lamentable if we should say, when a person has libelled another and has justified and has given particulars, that he is entitled to more than discovery of that which relates to those particulars. I think in principle that is right. In substance, therefore, I think this appeal ought to succeed.

Now comes the question of form. The secretary of the plaintiff company has made six affidavits, and I confess I should have thought them all insufficient and improper in point of form until we come to the last. He has made affidavits in which he admits that two books—the policy book and the claims register—which relate to the matters in question were left out of the first five affidavits, but he put them in the last. He admits then they relate to the matters in question, and he does not adequately claim protection from inspection until he comes to the last affidavit—the sixth. When a person makes an affidavit of documents which he admits relate to the matters in question in the suit, and some of the contents of which he wants to protect from discovery, what is the proper way to do it? There is a proper way, and the proper

way has not been taken. What he is bound to do is this. He is bound to take upon himself the responsibility of stating on oath the particulars which do and which do not relate to the matters in question, and that the secretary did not do; he did nothing like it until we come to his sixth and last affidavit. In the case of *Budden* v. *Wilkinson* (1) the person who made the affidavit did take that burden on himself, for he tied up bundles and numbered them and said, "These do relate to the matters in question and the others do not"; so that upon an indictment of perjury all you would have to do would be to turn to his affidavit and see what he had undertaken to swear did not refer to the matters in question. The secretary made a number of loose affidavits which were utterly insufficient in form, and if it were not for the sixth I should think an order of discovery was a matter of course, simply because he has not protected them. The sixth affidavit has given rise to the difficulty in the case. The real controversy is this. The defendants say, "We admit we have seen what relates to our particulars, but we want to see more. Bearing in mind that is the real controversy, I think the sixth affidavit amounts to this, "Except what you have seen, I have nothing which relates to the matters in question, cut down as they are by the particulars." And I think that is the real truth. Now although the form is wrong, I am not prepared to say now, especially after this long controversy, that the substance is not sufficient for the purpose. Reliance has been placed upon the further particulars given under Order XXXVI., r. 37; but I am satisfied those particulars were given without any sufficient justification and that they may be disregarded. I consider this as a mere attempt to give particulars without leave, and I disregard it as irregular and improper. The substance of it is this. The secretary has brought all this upon himself by not making a proper affidavit in a proper form in the first instance; but he has at last done that which now, considering the broad issues between the parties, we hold sufficient to protect these documents referred to. The result is that the order of Day J. will be discharged, and the costs of the appeal will be given to the plaintiffs in any event.

(1) [1893] 2 Q. B. 432.

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A. L. SMITH L.J. This is an action brought by the Yorkshire Provident Life Assurance Company against the proprietors of a newspaper for libel. It certainly is a very strong libel; the defendants say of the plaintiff company that they are a dishonest company, and they wonder how long they will be permitted to prey upon the confiding poor, and why they are not ashamed to collect premiums, and refuse to pay claims on the most frivolous pretext. I have only read a portion of the libel to shew the character of it. Whereupon the insurance company bring an action for libel against the defendants, and the defendants justify. If the case had rested there, and no particulars had been given, I do not think that any inspection of the plaintiffs' books ought to have been ordered, or that the plaintiff ought to have been put under discovery at all. The cases which decided this in actions of libel are the *Metropolitan General Omnibus Co.* v. *Hawkins* (1), and *Zierenberg* v. *Labouchere.* (2) But inasmuch as the defendants were able to give particulars of the malpractices, or what they call the malpractices, of the plaintiff company, they were able to put the plaintiff company under discovery, and they gave particulars of thirty instances of the plaintiffs' malpractices. Discovery as to these they are entitled to at the most. The secretary of the plaintiff company then sets to work to swear affidavits to prevent any inspection. The first affidavit he makes leaves out the two most important books, namely, those shewing the dates when the claims are made by policy-holders and the dates when they are paid or settled. That is a most important point as regards the alleged justification the defendants are about to set up against the plaintiffs. The secretary did not swear a fair above-board affidavit. Pressure was then put on him, and after having waded through five affidavits, at last in the sixth he screws himself up to the concert pitch and swears an affidavit which is sufficient. Now what happens upon that? The defendants see all the entries which the secretary, under that sixth affidavit, states to be entries relating to the matters in dispute between the parties; that, as I understand it, is relating to the matters in the plea of justification which the defendants will be at liberty to prove

(1) 4 H. & N. 146. (2) [1893] 2 Q. B. 183.

when they come to trial—that is to say, the particulars setting out the thirty instances. What the defendants now want, as they admit, is everything which appertains to the thirty different cases they say they are going to prove, and they want to look through the plaintiff company's books from 1886 to 1892, to see whether or not they cannot pick out something more notwithstanding the sixth affidavit of the secretary, and then to amend their particulars. I admit, after the secretary's six affidavits, I should like, if I had the power, to make them disclose these entries; but I do not think, following the rule which has been enforced and laid down by authority over and over again, we ought to make that order. It would, as Mr. Lush has said, be going further than the Courts have gone. It is not like *Jones* v. *Monte Video Gas Co.* (1), where it was shewn that the particular document had not been disclosed; but it is a case in which the defendants want, as I say, to go roving through the whole of the plaintiff company's books to find out something if they can. For this reason I am of opinion that the learned judge's order cannot be supported, and that the master was right.

Appeal allowed.

Solicitors: *L. Kirkman, for J. H. Roberts, Burnley; M. Webb & Sons.*

(1) 5 Q. B. D. 556.

M. W.

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April 1, 2, 3.

[IN THE COURT OF APPEAL.]

NEVILL *v.* FINE ARTS AND GENERAL INSURANCE COMPANY, LIMITED.

Defamation—Libel—Privileged Occasion—Excess of Privilege—Malice—Corporation.

On the trial of an action for libel against an incorporated company in respect of a statement contained in a circular composed by the secretary of the company and sent by him to certain of their customers, the judge having ruled that the occasion was privileged, the jury found that the statement complained of was in excess of the privilege, but did not find actual malice on the part of the defendants' secretary:—

Held that, the occasion being privileged, in the absence of a finding of actual malice the defence of privilege was not rebutted, and, there appearing on the facts of the case to be no evidence of actual malice in the publication of the statement complained of, the action was not maintainable.

Query, whether malice on the part of their secretary would have made the defendants liable.

Action for libel tried before Pollock B. with a jury.

The facts, so far as material to this report, were as follows.

The plaintiff had for about two years previously to the end of 1893 been employed to act as agent for the defendants, an insurance company, on the terms that he should receive certain commissions on insurances effected through him, the defendants guaranteeing that the amount of such commissions should reach 100*l.* per annum, together with certain allowances towards his office expenses. The business of the agency was carried on at offices which he rented at 27, Charles Street, St. James's Square. The plaintiff being dissatisfied with the remuneration and allowances which he received, a correspondence took place between him and the defendants on the subject; but, the parties not being able to agree upon terms for a fresh agreement, the defendants on December 21, 1893, wrote to the plaintiff that they had come to the decision to terminate the agreement with him, but that they were quite willing to pay him the usual commission for any business he might "continue with the company or influence to it in future." Further negotiations as to a fresh agreement

took place between the plaintiff and the defendants after the date of the above-mentioned letter, during which the plaintiff continued to carry on the agency business at 27, Charles Street, but they were still unable to agree as to terms for the future. Ultimately, on March 13, 1894, in answer to a letter from the defendants' secretary asking for information as to the plaintiff's intentions and stating that it was necessary that the plaintiff's relations with the company should be finally settled by the end of the week, the plaintiff's solicitor wrote to the defendants that the plaintiff wished to sever all connection with the defendants' company as he did not consider that the terms that the defendants had offered were satisfactory. The premiums for the renewal of certain policies effected with the defendants through the agency of the plaintiff being then about to fall due, a circular was drawn up and sent by defendants' secretary on behalf of the defendants to the holders of these policies in the following terms:—

"Sir or Madam,—In forwarding you the enclosed renewal notice I beg to inform you that the West End office of this company has been opened at 19, St. James's Street, S.W., under Mr. Murray Faulkner. The agency of Lord William Nevill at 27, Charles Street, St. James's Square, has been closed by the directors."

This circular had been drafted, by order of the defendants' secretary, by a clerk of the defendants named Gorst, who was called for the plaintiff, and said that, as originally drafted by him, the circular stated that the plaintiff had resigned his agency, but that the defendants' secretary had directed him to alter it by stating that the directors had closed the agency, because the words he had used would not fulfil exactly the object of the circular, which was to induce the clients who had insured through the plaintiff hitherto to continue insuring directly with the company.

The libel complained of was the statement that the agency of the plaintiff at 27, Charles Street, had been closed by the directors. Alternatively, the statement of claim complained of that statement as meaning that the plaintiff had been dismissed

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by the defendants from his employment as their agent for some reason discreditable to him.

The learned judge ruled that the alleged libel was published on a privileged occasion, and he left to the jury the following questions: (1.) whether the circular was a libel; (2.) whether it was published falsely and maliciously; (3.) whether the words meant that the plaintiff was dismissed from the defendants' employment for some reason discreditable to himself. The jury answered the first question in the affirmative and assessed the damages at 100*l.*; but they were unable to agree as to the second and third questions, and therefore did not answer them. The learned judge thereupon put to the jury the further questions: (1.) whether the statement in the circular that the plaintiff's agency was closed by the directors was true; (2.) whether the defendants in making that statement had exceeded the privileged occasion which entitled the defendants to give a notice that the agency was at an end. The jury answered the first of those questions in the negative, and the second in the affirmative.

On further consideration the following judgment was delivered by

POLLOCK B. In this case the counsel for the defendants contended in the first place that the letter complained of did not constitute a libel. In support of that contention the decision of the House of Lords in *Capital and Counties Bank* v. *Henty* (1) was cited. In that case Lord Selborne L.C. said, in giving judgment: "In *Sturt* v. *Blagg* (2) Wilde C.J. said: 'It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but, when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.' If the judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury." In the same case Lord Blackburn quotes from a judgment of Lord Mansfield in *Rex* v.

(1) 7 App. Cas. 741. (2) 10 Q. B. 899, at p. 908.

Shipley (1) as follows: "Every circumstance which tends to prove the meaning is every day given in evidence, and the jury are the only judges of the meaning," and then goes on to say, "If the words were reasonably capable of a meaning which in the opinion of the Court would be libellous on the plaintiffs personally, I think there can be no doubt that it ought to have been left to the jury to say whether the words bore that meaning." That case is valuable as laying down the principle by which judges should be guided; but the facts differ very widely from those of the case now before me. Acting on the rule as laid down in that case, I thought that the letter in question, when coupled with the facts which were given in evidence disclosing the circumstances under which the letter was framed and the object for which it was published, was fairly capable of being treated as a libel, and raised a question which ought to be decided by the jury, not the judge, namely, whether the untrue statement that the agency of the plaintiff had been closed by the directors was not libellous, as being calculated to produce in the minds of those conversant with the matter an impression unfavourable to the plaintiff, and prejudicial to his position as an insurance agent. The facts in the case of *Capital and Counties Bank* v. *Henty* (2) were very different. There was in that case no untruth whatever, and the statement complained of was merely a notice as to the course which the defendants intended to pursue in future, namely, that they would not receive from their customers cheques on the plaintiffs' bank—a course which might well be adopted from motives of convenience, quite apart from any reflection on the credit or solvency of the plaintiffs.

The jury having found the letter to be a libel, the question then arose whether the occasion upon which it was published was privileged. That is a matter of law to be decided by the judge, as was held in *Somerville* v. *Hawkins* (3) and other cases; and, the letter having been sent to the defendants' customers with a view to inform them of a fact which related to the mode in which their business would in future be carried on, I told the

(1) 4 Doug. 164.
(2) 7 App. Cas. 741.
(3) 10 C. B. 583.

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jury that the occasion which required the writing of some such letter was privileged. It was then contended for the plaintiff that, although the occasion was privileged, that part of the letter which stated falsely that the plaintiff's agency had been closed by the directors was not called for by the requirements of the occasion, and therefore was in excess of the privilege. I left the question whether that was so to the jury, and they found upon it in favour of the plaintiff.

The question which now arises is whether upon this finding the verdict ought to be entered for the plaintiff. In considering this question, two matters have to be borne in mind: these are, first, that the defendants are a corporation, and secondly, that the excess found by the jury is not by reason of any extrinsic or personal act or conduct, but is intrinsic and arising from language used in the letter which is injurious to the plaintiff and unnecessary for the proper explanation to the defendants' customers of what had occurred.

It is clear law that an incorporated company is liable to an action for a libel contained in a writing the publication of which is authorized by the company, and which is in furtherance of the objects and business for which the company was incorporated. It was so held in *Whitfield* v. *South Eastern Ry. Co.* (1) Where the defendant is an individual, it has been usual where the libel complained of has been held to have been published on a privileged occasion and an excess of that occasion is alleged, whether that excess is extrinsic or intrinsic, to ask the jury whether the excess is such that they infer malicious intention on the part of the defendant. Indeed, when considering the libellous conduct of an individual, it is very difficult to exclude the question of motive. Whether it is necessary that the jury should come to the same conclusion where the defendants are a corporation and the excess is intrinsic has never, so far as I can find, been decided. If the matter were to be dealt with apart from authority, the logical consequence of well-established principles by which the law of libel is governed would lead me to the conclusion in such a case that the plaintiff is entitled to succeed although there has been no finding against the

(1) E. B. & E. 115.

defendants of express malice. It was decided many years ago in the case of *Mercer* v. *Sparks* (1) that a declaration in slander was sufficient, although the averment quod malitiose dixit was omitted, because the words themselves were malicious: and in accord with this it was held in *Rex* v. *Harvey* (2), which was the case of an information for libel, and in *Haire* v. *Wilson* (3), that malice need not be averred or proved; and in the latter case Lord Tenterden said: "The judge ought not to have left it as a question to the jury, whether the defendant intended to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act. If the judge thought the tendency of the publication injurious to the plaintiff he ought to have told the jury it was actionable and that the plaintiff was entitled to a verdict." In *Bromage* v. *Prosser* (4) Bayley J. says: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse." In *Whitfield* v. *South Eastern Ry. Co.* (5) a declaration against a corporation for libel was demurred to on the ground that there was no averment of malice. The Court held this to be unnecessary, and Lord Campbell in delivering the judgment says: "The demurrer to the declaration in this case can only be supported on the ground that the action will not lie without proof of express malice as contradistinguished from legal malice. But, if we yield to the authorities which say that in an action for defamation malice must be alleged (notwithstanding authorities to the contrary), this allegation may be proved by shewing that the publication of a libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill-will to the plaintiffs and did not mean to injure them. Therefore the ground on which it is contended that an action for libel cannot possibly be maintained against a corporation aggregate fails." These explanations of what constitutes a

(1) Noy, 35.
(2) 2 B. & C. 257.
(3) 9 B. & C. 643.
(4) 4 B. & C. 247.
(5) E. B. & E. 115.

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libel seem to me to be the true foundation of the decisions in which it has been held that a corporation may be guilty of a libel, although no personal ill-will can be attributed to it. If a corporation for its own benefit publishes that which is false and is calculated to injure any one it is right that it should be held responsible—and such is the law.

Is there then any distinction between the rule of law whereby a corporation is liable primâ facie for a libel and that which is applicable where it is sought to make a corporation liable for publishing what is false and calculated to injure any one, on an occasion which is privileged for the making of a necessary and proper statement, but not privileged for the making of the statement complained of which is unnecessary and improper? Must not the privilege to prevail be sufficient to cover not merely the occasion but the particular language used; or, in other words, does not a plaintiff succeed if he proves that the occasion did not justify the defendant in making a portion of a communication, the residue of which is justifiable? In considering the character of language used upon a privileged occasion it may be that juries ought not to be overcritical as to its force or warmth, inasmuch as, if the occasion is privileged, the mere use of words that are stronger than the occasion demands ought not to make that a libel which if expressed in milder terms would not be so. But, admitting that to be so, I do not think it is applicable to the facts of the present case. In *Warren* v. *Warren* (1) the defendant had written a letter to a person who had the management of a certain property, in which both the plaintiff and the defendant were interested, and the terms of the letter mostly related to the property; but it also contained a charge against the plaintiff of bad conduct to his relations. A verdict having been found for the plaintiff, on a motion for a new trial, Parke B. said: "So far as related to the common property, the letter might be confidential; but with regard to that part which reflected on the plaintiff's conduct to his mother and his aunt, it is impossible to hold that the defendant was privileged. The manager could have nothing to do with that." When the authorities are referred to, although,

(1) 1 C. M. & R. 250.

no doubt, some difficulty arises from the use by the judges of the expression "express malice" when dealing with the improper use of a privileged occasion, that expression has often been found fault with and explained away, even where the defendant is an individual. In *Capital and Counties Bank* v. *Henty* (1) Lord Blackburn said: "If the occasion is such that there was either a duty, although, perhaps, only of imperfect obligation, or a right to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or I should prefer to say that he is not answerable for it, so long as he is acting in compliance with that duty or exercising that right; and the burthen of proof is on those who allege that he was not so acting." In *Abrath* v. *North Eastern Ry. Co.* (2), in which Lord Bramwell held that an action for malicious prosecution would not lie against a corporation aggregate on the ground that such a corporation is incapable of malice, he said, in speaking of the liability of a corporation for a libel: "So also they may be liable for the publication of a libel. That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable, although he had not a particle of malice against the man."

For those reasons I think that the plaintiff is entitled to have the verdict entered for him. In coming to this conclusion I have not overlooked the consideration that a corporation might be held liable for a libel upon the principle that they are responsible for the acts of their authorized agents when done for the benefit of the corporation and in pursuance of the objects for which it was incorporated, nor that there is some authority for saying that a corporation may be guilty of malice. That was suggested by Lord Campbell in *Whitfield* v. *South Eastern Ry. Co.* (3) The affirming of either of those propositions would

(1) 7 App. Cas. 741, at p. 787. (2) 11 App. Cas. 247.
(3) E. B. & E. 115.

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however give rise to some difficult and refined questions; and I prefer to rest my judgment upon what appears to me a safer basis by holding that the libel in question was, apart from any question of malice, a wrongful act in furtherance of the defendants' interests for which, as for other wrongful acts, a company is liable although a corporate body. There will, therefore, be judgment for the plaintiff for 100*l.* damages and costs.

The defendants applied for judgment or a new trial.

Sir E. Clarke, Q.C., and *J. E. Bankes* (*Harold Hodge* with them), for the defendants. First, the words complained of are not in themselves primâ facie libellous. They do not import that the plaintiff was dismissed by the defendants; and, assuming them to do so, a servant may be dismissed for reasons not in any way discreditable to him. There was no evidence to shew that they were capable of a defamatory meaning to those to whom they were published: *Capital and Counties Bank* v. *Henty* (1); *Mulligan* v. *Cole*. (2) The case cannot be treated as one of a statement damaging to a business in the nature of slander of title, for there was no special damage alleged or proved.

The occasion on which the statement complained of was published was privileged, and, that being so, the privilege can only be rebutted by proof of actual malice—i.e., that the publication was made, not in the bonâ fide exercise of the privilege, but from some improper or indirect motive. There are two senses in which the expression "excess of the privilege" may be used. There may of course be cases in which a communication made on a privileged occasion contains besides statements which are privileged some statement so entirely extraneous to the occasion in respect of which the privilege arises as to be entirely outside the privilege. In such a case it would be the duty of the judge to rule that, so far as that statement was concerned, the occasion was not privileged. It is submitted that this is not a case of that kind. The judge ruled, and rightly ruled, that the occasion was privileged, because the whole of the communication related to a subject-matter in which the defendants and those customers to whom the circular was sent had

(1) 7 App. Cas. 741. (2) L. R. 10 Q. B. 549.

a common interest. The only other sense of the expression "excess of the privilege" is that a statement made on a privileged occasion may be couched in such strong language or so exaggerate the facts as to afford evidence of actual malice—i.e., that the statement was made from some improper and indirect motive, and not in the bonâ fide exercise of the privilege. It is submitted that no excess of the privilege in that sense can render the defendants liable unless the jury find actual malice. It was not for the jury to say whether the occasion was or was not privileged in respect of the statement complained of; and no excess of language is material, so far as they are concerned, unless it satisfies them that there was actual malice: *Laughton* v. *Bishop of Sodor and Man* (1); *Warren* v. *Warren*. (2) A corporation is not capable of actual malice, which is a state of mind: *Western Bank of Scotland* v. *Addie* (3); *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (4); *Houldsworth* v. *City of Glasgow Bank*. (5) If a corporation could be liable in respect of the actual malice of their servant, there was not in this case any evidence of such malice, either extrinsic or intrinsic—i.e., to be derived from the terms of the statement. It is contended that the effect of what took place really was that the plaintiff's engagement was closed by the defendants; or, even if that were not so, that the secretary might well take the view that it was, and think it material to the interests of his employers that the circular should so state. [They also cited *Stuart* v. *Bell* (6); *Clark* v. *Molyneux*. (7)]

Finlay, Q.C., and *A. H. Poyser*, for the plaintiff. Having regard to the evidence, the statement that the plaintiff's agency had been closed by the directors was capable of a construction unfavourable to the plaintiff by those to whom it was made, and it was therefore a question for the jury whether it amounted to a libel. The jury found that the statement was untrue, which distinguishes the case from that of *Capital and Counties Bank* v. *Henty*. (8)

(1) L. R. 4 P. C. 495.
(2) 1 C. M. & R. 250.
(3) L. R. 1 Sc. Ap. 145.
(4) 18 Q. B. D. 714.
(5) 5 App. Cas. 317.
(6) [1891] 2 Q. B. 341.
(7) 3 Q. B. D. 237.
(8) 7 App. Cas. 741.

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The question whether the occasion is privileged is for the judge; but, when he has ruled on that question, it is for the jury to say whether the publication was made in the exercise of the privilege: *Padmore* v. *Lawrence*. (1) It has no doubt been often said that, where the occasion is privileged, express malice must be shewn in order to rebut the privilege, and that mode of expressing the law may generally speaking be correct; but it is submitted that the more scientific mode of expressing it is that adopted by Lord Blackburn in *Capital and Counties Bank* v. *Henty* (2), where he says that the question really is whether the communication was made in compliance with the duty or in the exercise of the right upon which the privilege depends. If the plaintiff can shew either from extrinsic or intrinsic evidence that the statement complained of was not made in the exercise of the privilege, but was in excess of it, as the jury have found in this case, he is entitled to succeed. The term "malice" has been used somewhat unfortunately in regard to actions of libel, as was said by Lord Bramwell in *Abrath* v. *North Eastern Ry. Co.* (3) The term as used in law for this purpose does not mean any personal ill-will or other improper motive towards the plaintiff. It means that a wrongful act is done intentionally without any lawful excuse: *Bromage* v. *Prosser*. (4) Privilege is a legal excuse; but, if the libel is in excess of the privilege, i.e., is not published in the exercise of the privilege, there is an intentional wrongful act for which the defendant is responsible and the law implies malice.

A corporation is capable of actual malice for this purpose in the sense that it is responsible for the malice of a servant making a statement in the course of his employment. It is clear that, where the occasion is not privileged, a corporation may be sued for libel, for malice will be implied from the words. How can the law impute malice to a corporation, if it is incapable of actual malice? There was evidence of malice in this case on the part of the defendants' secretary for which the defendants are responsible. Libel does not stand on an exceptional footing in this respect. It is only an example of the doctrine,

(1) 11 A. & E. 380.
(2) 7 App. Cas. 741.
(3) 11 App. Cas. 247.
(4) 4 B. & C. 247.

respondeat superior. In other cases in which the master is responsible for the tortious act of the servant done in the course of his employment, such as cases of fraud or negligence, the servant is really guilty of the whole of the tortious act. In *Barwick* v. *English Joint Stock Bank* (1) the defendants were made liable for the fraudulent representation of their servant.

The jury, no doubt, have not found malice on the part of the defendants' secretary in terms, but they have found that which for the purpose of rebutting the privilege constitutes malice, namely, that the statement complained of was in excess of the privilege, i.e., was not made in the exercise of the privilege.

J. E. Bankes, in reply.

LORD ESHER M.R. I have come to the conclusion that it is not necessary for the purposes of this case to decide many of the nice questions which have been argued before us. The action is brought by the plaintiff against the defendants, who are a corporation, for libel. The alleged libel was contained in a circular composed by or at the dictation of the defendants' secretary and sent to certain clients of the defendants, who had insured their goods with the defendants, and who would have to renew their policies, as it is called, that is to say, to pay the premiums for policies for the ensuing year, if they wished to continue their insurances with the defendants. The plaintiff had been employed by the defendants as their agent to manage what they called their branch office in Charles Street, though in point of fact the office was taken in his name, and he paid the rent for it. There is no doubt that he was to use the influence he might have with people in society at the West End to induce them to insure their goods with the defendants, but the terms of such insurances would be settled and the business in connection therewith would be transacted at the office in Charles Street. At the end of the year 1893 he intimated to the defendants that he did not wish to carry on the agency any longer on the existing terms; and the defendants apparently did not wish that he should do so. But did the defendants then

(1) L. R. 2 Ex. 259.

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break off their relation with him so that he was no longer their agent? It seems to me that they did not; that he went on during the negotiations for a fresh agreement still acting as their agent to procure insurances, and that the business in connection therewith was still transacted by him at the office in Charles Street, until he broke off the negotiations and declined to have any further connection with the company. Thereupon the circular in question was issued. It appears, as I have said, to have been drawn up at the dictation of the defendants' secretary and circulated by him, there being no evidence that the directors of the company had anything to do with it. It was sent only to persons who had already insured with the defendants, and from whom the premiums for the renewal of their policies for the coming year were about to become due, for the purpose of intimating to them that they were to pay those premiums to the new branch office and not to the plaintiff at Charles Street.

It seems to me that the terms of that circular come as nearly as possible to being incapable of a defamatory meaning; but it is not necessary, I think, to go the length of deciding that they are so. Having regard to the evidence given by Gorst, and reading the circular in connection with that evidence, it may be that the circular was capable of two constructions, one of which would be defamatory, and, that being so, it would be for the jury to say whether it was a libel or not. If they thought that the circular would mean to the persons to whom it was sent that the plaintiff had been discharged by the defendants, and that to the mind of a reasonable person that might convey the impression that he had been discharged for some reason discreditable to himself, they might find that the circular was a libel. That being so, I am unable to say that the finding of the jury on that question was wrong. Therefore, we must take it that the defendants, through their servant, have published a libel. If the matter stood there without more, the law would infer malice, the meaning of which really is that it does not signify what the motive of the person publishing the libel was, or whether he intended it to have a libellous meaning or not. If such a libel be published on behalf of a corporation by their servant, primâ

facie they are liable, and no question arises as to the motive with which it was published. When the plaintiff had given evidence sufficient to go to the jury of the publication by the defendants through their servant of a libel, he had done all that was necessary to support his cause of action. But then the defendants set up the defence that, assuming the document to be libellous, it was published on a privileged occasion. That is all the defendants need shew in order to constitute a good primâ facie defence. The question whether an occasion is privileged is for the judge and not for the jury. If the judge rightly holds the occasion to be privileged, though a libel has been proved, in the absence of anything further the defence is perfect. But then there is a well recognised reply to this defence, the onus of proving which lies upon the plaintiff, namely that the defendant has abused the privileged occasion by using it maliciously. We have been told that Lord Blackburn in the case of the *Capital and Counties Bank* v. *Henty* (1) has laid down a new way of putting this question to the jury. He there states the way in which other judges have put the question, and he does not say that it was wrong; all he says is that he prefers to put it in what he thinks better language. For a very long time past judges have over and over again directed juries that the defence that the occasion was privileged can only be rebutted by shewing that the defendant in using the privileged occasion has used it with actual malice, or "express" malice as it has been sometimes called. Exception has been taken to the latter term; but I think that judges using it have always explained its meaning to the jury by telling them in substance that there must have been actual malice, which is a state of mind. It has been argued here to-day on the one side that it must be actual malice in the mind of the defendant himself; on the other side that it is enough if there was actual malice in the mind of the person who in fact published the libel, and, if there was malice in his mind, his employers are responsible; that is to say, that the plea of privilege which the defendants set up is rebutted by the actual malice of their servant. It does not appear to me to be necessary to decide that question on the present occasion, and I will

(1) 7 App. Cas. 741.

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express no opinion on it, because I think there was not sufficient evidence to be left to the jury that there was actual malice in the mind of the defendants' secretary. The jury declined to say whether he had acted maliciously in publishing the circular or not. That is immaterial if we think that there was no evidence of malice. Therefore, assuming that in the case of a corporation the plea of privilege can be rebutted by proving actual malice in the mind of their servant, in this case there was no evidence of such malice. That being so, the defendants have proved that the occasion was privileged, and there was no evidence of malice in the mind of anybody to rebut that privilege, and the defence stands good. But then the jury were asked to find, and have found, that the privilege was exceeded. There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion. But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice. In none of the cases on the subject, so far as I know, has it been held that the privilege is taken away when there has been such an excessive statement, unless the jury has found that there was malice. I protest against the notion that a judge has a right to say that, if the jury find that the statement is excessive, though they decline to find actual malice, the law infers it. If the law did so, it would often be inferring what is not true. A man may use excessive language and yet have no malice in his mind. There being no evidence of actual malice, the finding of the jury that the privilege was exceeded has no effect. For these reasons I think the application must be allowed and judgment entered for the defendants.

LOPES L.J. I am of the same opinion. A great many questions of considerable interest have been raised in the course of the argument which I think it is not necessary to decide. I have arrived at the same conclusion as the Master of the Rolls, namely, that there was no evidence of actual malice on the part of the defendants' secretary which ought to have been left to the jury. The first point taken was that the alleged libel was not reasonably capable of a defamatory meaning. If it were not for the evidence of Gorst I should have been inclined to take that view; but taking the circular in conjunction with that evidence, I cannot say that the judge was wrong in leaving the question whether it was a libel to the jury. I also think that he was right in holding that the occasion was privileged. The question whether that was so was entirely for the judge to decide. It was proved that the circular complained of was sent to some twenty persons who were customers of the defendants, and therefore there was that corresponding interest between those who sent and those who received the communication which constitutes a privileged occasion. The effect of the occasion being privileged is to render it incumbent upon the plaintiff to prove malice, that is, to shew some indirect motive not connected with the privilege, so as to take the statement made by the defendant out of the protection afforded by the privileged occasion. This he may do either by extrinsic evidence, by which I mean something outside the statement itself, or by intrinsic evidence, by which I mean something contained in the statement itself. The only evidence which could be put forward as extrinsic evidence of malice in this case was that given by Gorst. But it seems to me that the true view of that evidence is that it does not indicate any malice on the part of the secretary towards the plaintiff, but only a desire to preserve and protect the interests of his employers by keeping for them the business which he conceived to be theirs. Then, was there any intrinsic evidence of malice in the circular itself, on which the jury were entitled to act? There is, in my opinion, nothing in the circular which is wholly extraneous and has no relation to the privileged occasion; so that the cases which have been put, where something wholly foreign to the privileged occasion is contained in a statement, are not in point.

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Where the excess merely is that the statement made with reference to the privileged occasion is too strong, the authorities shew that such excess may be evidence of actual malice; but it is not in every case in which the words used are somewhat too strong that there is evidence to be left to the jury of actual malice. They must be too strong to a substantial extent in order to afford evidence upon which a jury can find actual malice. In the judgment in *Laughton* v. *Bishop of Sodor and Man* (1) it was said, "Some expressions here used undoubtedly go beyond what was necessary for self-defence; but it does not therefore follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications." I entirely agree with what was there said. In this case the jury declined to find malice, but they found that the privilege had been exceeded. I presume that under the circumstances they must have meant by that finding that the words used were too strong. It was argued that, because they found that, malice must be implied. There appears to me to be no authority for that proposition. I know of no case in which, where the occasion was privileged, it has not been left to the jury to find whether the defendant acted maliciously or not. The conclusion at which I arrive is that there was no evidence of malice either extrinsic or intrinsic which could reasonably be left to the jury, and, therefore, that the defendants are entitled to judgment.

The question has been argued whether a corporation can be made responsible for a libel where the occasion is privileged and therefore actual malice must be proved. It is said that a corporation cannot have a malicious mind, and therefore actual malice cannot be proved against them, although it is conceded that, if the occasion is not privileged, malice may be implied. I have some difficulty in seeing why, if a malicious mind can in the one case be implied from the words as against a corporation, in the other it cannot be proved against them. But this is a

(1) L. R. 4 P. C. 495, at p. 508.

point of some difficulty which it is unnecessary to decide in the present case, and which, if it were necessary to decide it, I should desire to consider more fully.

RIGBY L.J. I am of the same opinion. For a long time I had a great difficulty in seeing how the statement complained of could be capable of the libellous meaning imputed to it. But, having regard to the evidence of Gorst, I will not say that it was wrong to leave the question whether it was a libel or not to the jury, and, the jury having found that it was, I am not prepared to disagree with them.

Then, with regard to the question of privilege, it appears to me that everything stated in the circular had relation to the interests of the company, and it is difficult to see how there was any excess of the privilege. To say that any excess however small takes away the privilege is not justified by the authorities. The jury have found that the circular was a libel, and that there was an excess of the privilege—whether large or small they do not say; but they were not asked to find, and they did not find, that there was such an excess as satisfied them of the existence of actual malice. On the question whether there was evidence of actual malice on the part of the defendants' secretary for the jury, I come to the conclusion that there was no such evidence. On a strict construction of the circular there may be some slight indication of too much zeal for the company's interests on the part of the secretary, but I do not think there was anything that amounts to evidence of malice.

On the question whether a corporation can for this purpose be affected by the actual malice of its servant I desire to express no opinion.

Application to enter judgment for defendants allowed.

Solicitor for plaintiff: *R. C. Ponsonby.*
Solicitors for defendants: *Deacon, Gibson & Medcalf.*

E. L.

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June 17.

[IN THE COURT OF APPEAL.]

Ex parte SPELMAN.

Liverpool Court of Passage—Practice—Order XIV.*—Rules of Court.*

The Liverpool Court of Passage has not the powers which are given to the High Court by Order XIV.

APPLICATION for a rule nisi for a mandamus to the registrar of the Liverpool Court of Passage.

The applicant, having brought an action in the Liverpool Court of Passage, had applied to the registrar for leave to sign judgment under Order XIV. The registrar refused to entertain the application on the ground that he had no jurisdiction to exercise the powers of Order XIV. The applicant moved in the Divisional Court for a rule nisi for a mandamus to compel him to do so; but the Court (Pollock and Wright JJ.) refused to grant a rule.

Thereupon the applicant, by way of appeal from their decision, made a similar application to the Court of Appeal. (1)

Arthur Rutherford, for the applicant. The registrar of the Court of Passage had jurisdiction to give leave to sign judgment under Order XIV. By 2 & 3 Vict. c. 27, s. 1 (2), it was provided

(1) By the Passage Court Orders and Rules of December, 1876, it is provided, "(1.) The provisions of the Supreme Court of Judicature Acts, 1873 and 1875, and such orders and rules made in pursuance thereof as are now in force, as well as any orders or rules which may hereafter be made and be in force for the time being, by virtue of the said Acts, shall (except as hereinafter is excepted or otherwise provided for) extend and be applied to, and the forms therein mentioned shall be adopted and used in all actions, causes, and matters which at or after the time of the coming into operation of these rules shall be within the cognizance of the Court of Passage of the Borough of Liverpool, but so far only as such provisions, orders, rules, and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description of the court, the character of the parties, or the circumstances of the case may render necessary, but any variance therefrom not being in matter of substance shall not affect their validity or regularity."

(2) Repealed by Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5, and in substance re-enacted by s. 182 of that Act.

that every judge of a borough Court of Record might make such rules for regulating the forms and manner of proceeding and the practice in his court as should from time to time seem to him necessary and proper for expediting the business of such court with most convenience and at the smallest reasonable expense. The Passage Court Rules of 1876 were made under that provision. It is contended that the effect of rule 1 of these rules is to give to the Court of Passage the powers of Order XIV. By the Judicature Act, 1873, s. 89, it is provided that every inferior Court shall, as regards all causes of action within its jurisdiction, have power to grant such relief, redress, or remedy in as full and ample a manner as might and ought to be done in the like case by the High Court; and by s. 91 the several rules of law enacted and declared by the Act are to be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such Courts. Therefore the Court of Passage has jurisdiction to administer the remedy given by Order XIV., and by the rules of 1876 the necessary procedure is made applicable.

By s. 6 of the Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), the assessor is to have the same power, jurisdiction, and authority in regard to causes in the Court of Passage (subject to rules of court) as is possessed by a judge of the High Court in similar matters sitting in chambers or at nisi prius. By s. 7 the registrar of the Court of Passage is, in dealing with proceedings in that court, to have (subject to rules of court) all the powers of a master of the High Court. [He cited *Speers* v. *Daggers* (1); *King* v. *Hawkesworth* (2); *Fellows* v. *Owners of the Lord Stanley* (3); Liverpool Court of Passage Procedure Act, 1853 (16 & 17 Vict. c. xxi.), s. 73.]

LORD ESHER M.R. This case depends upon the construction of rule 1 of the Passage Court Orders and Rules of 1876. If that rule does not give the Passage Court the powers of Order XIV., it is admitted that the Court has not those powers. At the time when Order XIV. came into existence, the Court of Passage at

(1) 1 Cababé & Ellis, 503. (2) 4 Q. B. D. 371.
(3) [1893] 1 Q. B. 98.

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Liverpool was a court of a peculiar nature, regulated by statute. The assessor was not the judge of it. Originally the mayor and certain other corporation officials were the judges of it. It was found necessary that there should be some experienced lawyer appointed as assessor for the purpose of trying causes in it, when they were ripe for trial; but, with regard to pleadings and matters preliminary to the trial, the assessor had nothing to do with them. All he had to do was to go down to Liverpool, and, as assessor acting for the mayor and corporation, to try the causes set down for trial in the court. He has no doubt been given the powers of a judge who is trying causes. The case of *King* v. *Hawkesworth* (1), to which we were referred, was a case in which a question arose as to the costs at the trial, and the Queen's Bench Division appears to have thought that the rules under the Judicature Act were applicable to that matter; but that case really does not touch the present question. The assessor of the Passage Court never had any chambers, because he had no jurisdiction which he could exercise at chambers; he had no jurisdiction with regard to the preliminary steps in the action. Order XIV. has not to do with something which happens at the trial of an action. Its provisions, if exercised, are intended to prevent the necessity for a trial. The jurisdiction of a judge under Order XIV. is exercised by him as a judge at chambers. It is exercised by the master in the first instance, and there is what is in effect an appeal to the judge; but the jurisdiction is that of a judge at chambers. Then there is an appeal from the judge, which was originally to the Divisional Court, but is now to this court direct. Therefore, when the rule of 1876 was made, it was impossible that jurisdiction under Order XIV. should be exercised in the Court of Passage. The machinery for the exercise of the jurisdiction under that order did not exist in that court. Then we come to the rules of 1876. Those rules did not alter the constitution of the Passage Court; they could not give the assessor the jurisdiction in chambers. The Act of 1893 does no doubt extend his powers in certain respects; but his power of making rules under that Act has been bridled, so as to prevent his giving himself jurisdiction which he had not before, by pro-

(1) 4 Q. B. D. 371.

viding that he cannot make rules under it without the concurrence of the Rule Committee. Returning to the rule of 1876, it provides that the provisions of the Judicature Acts, and the orders and rules made or to be made by virtue of them, shall, except as thereinafter excepted or otherwise provided for, extend and be applied to, and the forms therein mentioned shall be used in, actions in the Court of Passage, "but so far only as such provisions, orders, rules, and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description of the court, the character of the parties, or the circumstances of the case may render necessary." The same difficulty existed after the making of that rule as existed before. The powers of Order XIV. cannot be administered in the Court of Passage without making alterations in the constitution of that court, which the assessor had no power to do. The opinion of all the judges who have had to do with this matter, and that of the learned assessor himself who made these rules, has been that the Court of Passage has no jurisdiction to exercise the powers given by Order XIV. Assuming that such a power could be conferred on the Passage Court by rules without further Parliamentary enactment, it certainly has not as yet been conferred. For these reasons, I think the application must be refused.

KAY L.J. I agree. The way in which the plaintiff's counsel endeavoured to establish his case was as follows. Reference was made to the provisions of 2 & 3 Vict. c. 27, s. 1, which enacted that in every borough named in the schedules to the Act in which by charter, custom, or otherwise, there was or ought to be holden a Court of Record for the trial of civil actions, every judge of such court should have authority to make such rules for appointing the times of holding such court and for regulating the forms and manner of proceeding, the process, appearance, practice, and pleadings in such court, as should from time to time seem to him necessary and proper for expediting the business of such court with most convenience and at the smallest reasonable expense, provided that no such rules should be of any force until they had been allowed and confirmed by three judges

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of the superior Courts of Common Law at Westminster. Under those provisions the Passage Court Rules of 1876, upon which reliance is now placed, were made and were confirmed by three judges. It is said that the first of these rules has the effect of giving to the Court of Passage the powers of Order XIV. By s. 39 of the Judicature Act, 1873, it is provided that "any judge of the said High Court of Justice may, subject to any rules of court, exercise in court or in chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in court or in chambers respectively by a single judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorized to be so heard by any rules of court to be hereafter made"; and "in all such cases any judge sitting in court shall be deemed to constitute a Court." Then, when we come to the rules in the schedule to the Judicature Act, 1875, we find the expression "the Court or a judge" constantly used. The expression, "a judge," so used clearly means a judge sitting in chambers. By Order XIV. in the schedule to the Act the jurisdiction under it was given to the Court or a judge. At the time when the rules of 1876 came into force there was an assessor of the Passage Court appointed for the purpose of trying causes, but he had no chambers, and the registrar of the Court was not in the same position for this purpose as a master of the High Court, who acts in chambers as though he were the judge, and whose order has the effect of an order by the judge at chambers. If a party to an action is dissatisfied with the order of the master, his remedy is to go to the judge in person. No application was made in the present case to the learned assessor of the Passage Court. The plaintiff applied at once to the Divisional Court for a mandamus to the registrar. He was no doubt obliged to take that course, because the judge of the Passage Court has no chambers. When we look at the terms of rule 1 of Passage Court Rules of 1876, the application breaks down at once upon the terms of the rule. The rule provides that the rules made under the Judicature Acts shall apply to the Court of Passage only so far as they are or

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may be applicable thereto. How could Order XIV., which enabled a judge at chambers to give leave to sign judgment summarily, be applied to the Passage Court? The registrar of that Court could not then act as a judge at chambers. The provisions of Order XIV. are of a very stringent character, and give most exceptional powers; and I cannot think that it ever could have been intended by the rule to give such powers to the registrar of the Passage Court. Reference was made to the subsequent legislation contained in the Liverpool Court of Passage Act, 1893, by which no doubt the position of the assessor of that Court is made more nearly analogous to that of a judge, and the position of the registrar is somewhat altered. But any rules to be made under s. 8 of that Act applying the practice and procedure of the High Court to the Court of Passage can only be made with the concurrence of the authority for the time being empowered to make rules for the Supreme Court. It is clear that the learned assessor of the Passage Court who made the rules of 1876 does not believe that he now has the powers of Order XIV., for he has applied to the Rule Committee to sanction rules giving him such powers. In my opinion the application fails.

A. L. SMITH L.J. This appears to me to be a plain case. It is unnecessary to decide whether the words of s. 1 of 2 & 3 Vict. c. 27, gave power to the assessor of the Court of Passage to make a rule applying the provisions of Order XIV. to the Passage Court. I will assume for the purposes of this case that they did give that power. When, however, the rule of 1876 which is relied upon is looked at, it will be seen that it provides that the rules made under the Judicature Acts shall apply to the Passage Court, "so far only as they are or may be applicable thereto." The reasons why the provisions of Order XIV. could not be applicable to the Passage Court have been fully stated by the Master of the Rolls and Kay L.J. When the assessor of the Passage Court was merely an assessor who went down for the purpose of trying the causes set down for trial in that court he had no chambers, and the provisions of Order XIV. could not therefore apply to that court. It was contended that the position

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of the assessor has been altered by the Act of 1893 to that of a judge in the full sense of the term. But it is to be observed that the effect of the alteration of his position under that Act depends upon the promulgation of rules under s. 8 of the Act. No such rules have been yet promulgated, and they can only be promulgated with the concurrence of the authority for the time being empowered to make rules for the Supreme Court, i.e. the Rule Committee. An attempt has been made to procure the concurrence of the Rule Committee in an extension of the jurisdiction of the Court of Passage in respect of Order XIV., but has not hitherto been successful. For these reasons I think that the application must be dismissed.

Application dismissed.

Solicitors for applicant: *Norris, Allens & Chapman, for J. M. Quiggin & Brothers, Liverpool.*

E. L.

C. A. 1895 *June* 12.

[IN THE COURT OF APPEAL.]

LYNDE *v.* WAITHMAN.

Practice—Mortgage Debt, Action for—Receiver—Special Indorsement on Writ—Liquidated Sum—Order XIV.

Where a mortgagee appointed a receiver, who received rents, and afterwards the mortgagee brought an action specially indorsing the writ with a claim for the mortgage debt and interest, and applied for judgment under Order XIV.:—

Held, that the mere fact of a receiver having been appointed did not prevent the application of Order XIV., but, as there appeared to be a question as to what on the true state of the account as between the mortgagor and mortgagee was due to the latter, leave to defend must be granted.

Poulett v. *Hill* ([1893] 1 Ch. 277) explained.

APPEAL from the order of Pollock B. at chambers, affirming the order of a district registrar giving leave to the plaintiff to sign judgment under Order XIV.

The writ in the action was indorsed as follows: "The plaintiff's claim is for principal and interest due under a covenant in a deed dated November 2, 1893. Particulars: Principal due 900*l.*:

Interest thereon from June 2, 1894, to December 2, 1894, at 5 per cent., 22*l.* 10*s.*—Amount due, 922*l.* 10*s.*" The facts as appearing from the affidavits were as follows. By an indenture of mortgage dated November 2, 1893, and made between the defendant, of the first part, William Alfred Lynde, the plaintiff, and Robert Edward Branthwaite, who carried on business in partnership as solicitors, of the second part, and the said William Alfred Lynde of the third part, after reciting that the defendant was entitled to certain hereditaments in fee simple subject to certain mortgages therein mentioned, it was witnessed that, in consideration of the sum of 1600*l.* owing by the defendant to the said William Alfred Lynde and Robert Edward Branthwaite, and of the sum of 900*l.* owing by the defendant to the said William Alfred Lynde, the said hereditaments were, subject as thereinbefore recited, conveyed by the defendant to the said William Alfred Lynde and Robert Edward Branthwaite in fee simple, subject to a proviso for redemption of the same if the defendant, his heirs, executors, administrators or assigns should on the 2nd day of December then next pay to the said William Alfred Lynde and Robert Edward Branthwaite, or the survivor of them, or the executors or administrators of such survivor their or his assigns, the sum of 1600*l.* with interest for the same in the meantime at the rate of 5*l.* per cent. per annum, and should also on the 2nd day of December then next pay to the said William Alfred Lynde, his executors, administrators, or assigns, the sum of 900*l.* with interest for the same in the meantime at the rate of 5*l.* per cent. per annum. It was provided by the deed that the power of sale and other powers conferred by statute on mortgagees, and all provisions incidental thereto, should be deemed to apply to those presents and the security intended to be thereby effected, but the 17th section of the Conveyancing and Law of Property Act, 1881, should not apply thereto, and that a receiver might be appointed by the said William Alfred Lynde and Robert Edward Branthwaite, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, immediately after default should be made in payment of any interest or in performance of the covenants thereinafter contained in relation to the payment of the interest on the prior mortgage

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debts or otherwise. It was further provided that the mortgagees should apply any moneys which might arise from any sale of the premises conveyed, after reimbursing themselves all costs and expenses incurred in the execution of any of the trusts or powers given by the deed, or conferred by statute, or otherwise in relation to the premises, in or towards satisfaction of the said sums of 1600*l.* and 900*l.* intended to be thereby secured and the interest thereon respectively, or so much thereof respectively as should remain owing, rateably and pari passu. Then followed covenants by the defendant with the said William Alfred Lynde and Robert Edward Branthwaite for the payment on December 2 then next of the principal sum of 1600*l.* with interest thereon in the meantime at the rate of 5*l.* per cent. per annum, and, if the same should not then be paid, for payment of interest at the same rate half-yearly on June 2 and December 2 as long as the same should remain unpaid, similar covenants by the defendant with William Alfred Lynde for payment of the principal and interest in respect of the sum of 900*l.* and covenants by the defendant with the mortgagees to pay the interest on the prior mortgage debts, and to pay the principal of them when required. It was stated in an affidavit made by the defendant that prior to the action a receiver of the rents of the mortgaged premises had been appointed by the mortgagees. It appeared that the mortgagees had on May 15, 1894, written to a person who acted as agent to the defendant to the following effect: "Please take notice that you are not to collect any further rents of the cottages at Bradford except as our agent, and that you are not to pay over such rents to any person other than ourselves: we give you this notice under a certain indenture of November 2, 1893, made between Mr. Waithman and ourselves, under which the property in question was conveyed to us subject to redemption." It was stated in substance by the defendant's affidavit that the defendant was informed and believed that the receiver had received rents, for which and for sums paid by the defendant the plaintiff had not given the defendant credit, and that he had endeavoured without success to get an account of the items pro and con of the plaintiff's claim and of the rents received by the receiver or of their application, and, in the absence of an account from the plaintiff, he could

not tell how the plaintiff had applied the surplus moneys. The plaintiff in his affidavit in reply alleged that the receiver had been appointed in respect only of the debt of 1600*l.* due to the firm of Lynde & Branthwaite as mentioned in the mortgage deed, and not of the debt of 900*l.* due to himself alone, and he made an exhibit to his affidavit a statement of account purporting to be an account as between Lynde & Branthwaite as mortgagees and the defendant as mortgagor. This account debited the mortgagees with a lump sum for rents received from May 19, 1894, to May 9, 1895, on the one side, and on the other took credit against the mortgagor for certain payments among which were items in respect of outgoings on the premises, interest on the prior mortgages, interest due June 2 and December 2, 1894, on the debt of 1600*l.*, and interest on the debt of 900*l.* due to the plaintiff from June 30, 1893, to June 2, 1894, and for arrears of interest on the sum of 1600*l.* and the sum of 900*l.*

The district registrar had granted leave to sign judgment under Order XIV., and on appeal the learned judge had affirmed his order.

Danckwerts, for the defendant. In this case the receiver was clearly appointed in respect of the debt of 900*l.* due to the plaintiff as well as of the debt of 1600*l.* due to the firm of Lynde & Branthwaite. A receiver having been appointed with power to receive the rents, the case does not come within Order XIV., and is not one in which the writ should have been specially indorsed for a liquidated sum under Order III., r. 6. This was decided in *Poulett* v. *Hill*. (1) The case is, at any rate, one in which Order XIV. ought not to be applied, because the affidavits disclose matters sufficient to entitle the defendant to leave to defend.

McCall, *Q.C.*, and *L. Sanderson*, for the plaintiff. The receiver was not appointed in respect of the debt of 900*l.* due to the plaintiff, but only of the debt of 1600*l.* owing to the firm of Lynde & Branthwaite. On the affidavits it is clear that the sums received by the receiver were not sufficient to cover any portion of the amount sued for.

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LORD ESHER M.R. I do not acquiesce in the contention, which I understood the defendant's counsel to make, that the mere fact of a receiver having been appointed prevented the plaintiff from indorsing his writ so as to enable him to apply for judgment under Order XIV. In this case the writ was specially indorsed with a claim for a liquidated sum, and, therefore, the plaintiff was entitled to apply under that order. But the defendant, by way of answer to that application, says that the plaintiff is not entitled to sign judgment for the amount claimed, because he has been a party to the appointment of a receiver under the mortgage deed, and the receiver has, under that authority from the plaintiff and his co-mortgagee, received moneys, and has paid something to the plaintiff in respect of what was due to the plaintiff under the mortgage deed; and he says that it appears that the receiver has received other moneys, and that it is impossible for him to say whether some part of what has been so received has not been applied, or will not be applicable to payment of the interest, and perhaps part of the capital of the mortgage debt, in respect of which this action is brought. The plaintiff says that no sums have been received which are so applicable, and the defendant says that such sums have been received and that he has not received any sufficient account to shew whether that is so or not. It seems to me, therefore, that the evidence before the judge raised a substantial question in dispute between the parties as to whether some, and if so what, amount has been paid in respect of the sums claimed in the action. If regardless of that, leave is given to sign judgment for the amount claimed, it may be that the plaintiff would get payment of more than is due. If there is a plausible dispute as to the amount which the plaintiff is entitled to recover, I think the judge, though bound to entertain the application for judgment under Order XIV., was bound not to allow judgment to be signed in the face of such a dispute. That is the general rule with regard to the exercise of jurisdiction under Order XIV. Therefore, I think that, although in this case the judge was right in entertaining the application, he ought not to have given leave to sign judgment, and therefore, his order should be set aside and the defendant allowed to defend.

KAY L.J. In this case, the claim indorsed on the writ being for principal and interest due under a covenant in a mortgage deed, there was on the face of it a claim for a liquidated sum, and primâ facie therefore the plaintiff had a right to apply for judgment under Order XIV.; but, then, by the terms of that order the defendant may by way of answer to the application satisfy the judge that he has a good defence on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend. It appears to me that this case turns, not on any question as to the sufficiency of the indorsement on the writ, but on the question whether upon the evidence facts have been disclosed sufficient to entitle the defendant to defend the action. What are the facts? There was in this case a mortgage which included both the sum of 1600*l.* due to the firm of Lynde & Branthwaite and the sum of 900*l.* due to Lynde alone, and the proviso for redemption was for redemption only on payment of both these sums. The deed provides that the power of sale, and other powers conferred by statute on mortgagees, and all provisions incidental thereto shall be deemed to apply to these presents and to the security intended to be thereby effected, and that a receiver may be appointed by the said William Alfred Lynde and Robert Edward Branthwaite immediately after default in payment of any interest, &c. That means any interest either on the sum of 1600*l.* or the sum of 900*l.* It appears to me that there is no power to appoint a receiver in respect of the sum of 1600*l.* and not of the sum of 900*l.* The receiver when appointed is appointed for the purpose of realizing this security, which is for both the sums. The only matter that could amount to the appointment of a receiver in this case was a letter of May 15, 1894, by which notice was given by Lynde & Branthwaite to a person who had been acting as agent for the mortgagor not to collect any further rents of the mortgaged property, except as their agent, and not to pay over any such rents to any person but themselves, and it was stated that the notice was given under a certain indenture of November 2, 1893, made between Mr. Waithman and themselves under which the property in question was conveyed to them subject to redemption. The property was conveyed subject to redemption not on payment of either of the

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sums alone, but on payment of both, so that, when they gave this notice to him to become their agent for receipt of the rents of the property which was charged, whatever the legal effect of that notice was, it was in respect of both the sums of 1600*l.* and 900*l.*, not in respect of the sum of 1600*l.* only. Then what was the effect of that notice? Both parties have agreed in treating it as amounting to the appointment of a receiver; and that, no doubt, is the better view for the mortgagees, because, if it amounted to taking possession of the property, the responsibilities of the mortgagees would be more onerous than if it merely amounted to appointing a receiver. I will assume that it amounted only to appointing a receiver. On the application being made for judgment under Order XIV. the defendant says by way of answer that a receiver has been appointed and not only that, but he has received rents, and that the defendant does not know and cannot ascertain how much he has so received. In answer to that the plaintiff produces an account purporting to be given by the mortgagees which shews a certain amount received in rents, and on the other side certain items claimed per contra, among which is a payment of interest on the sum of 900*l.* from June 30, 1893, to June 2, 1894, at 5 per cent., the effect of which appears to me to be clearly to shew their understanding that the receiver was appointed as much in respect of that sum as of the sum of 1600*l.* The writ has no doubt been indorsed with a claim for a liquidated amount, but the evidence, as it stands, appears to me to raise a question whether the amount so claimed is due or not, and whether a judge might not properly say that there must be an account of what the receiver has received before there can be a judgment on the claim. Therefore it appears to me that the case is not a proper case for the application of Order XIV. It has been argued that the case of *Poulett* v. *Hill* (1) has absolutely decided that the moment a receiver has been appointed, the case is not one in which there is a liquidated sum for which the writ can be specially indorsed under Order III., r. 6, for the purposes of Order XIV. I do not think that is the result of that case. That case was one in which the mortgagees had brought an action to realize their security, and before an account had been taken a

(1) [1893] 1 Ch. 277.

receiver was appointed, and subsequently the plaintiffs brought another action for interest in which they applied for judgment under Order XIV. The Court said that the case was not one in which a writ ought to have been indorsed for a liquidated sum, inasmuch as there was a prior action proceeding in which an account must be taken. To say that this was a decision that the mere appointment of a receiver prevents the indorsement of the writ with a claim for a liquidated sum is altogether a misapprehension. It was a case in which an account would have to be taken in the former action, and, therefore, the Court was induced to say that it was not a proper case for a specially indorsed writ. In this case the question is not as to the effect of the mere appointment of a receiver, but whether upon taking an account the amount claimed would be found to be due. I think, however, that there is sufficient analogy between this case and that of *Poulett* v. *Hill* (1) to shew that this case like that is not a proper one for the application of Order XIV., and that the learned judge ought not to have given the plaintiff leave to sign judgment.

A. L. SMITH L.J. In this action the writ was specially indorsed with a claim for a liquidated sum, and no exception could be taken to that indorsement on the ground that it did not come within Order III., r. 6. Thereupon the plaintiff made an application for judgment under Order XIV. The defendant in answer to that application says that a receiver has been appointed a year ago by the plaintiff; that rents have been received by him during that year; and that he, the defendant, cannot get an account of what has been so received, and until he does he cannot tell whether the whole or, if not the whole, how much of the sum claimed is due. It was attempted to meet this by saying that whatever the receiver had received was in respect of a sum of 1600*l.* due to Lynde & Branthwaite and not of the sum of 900*l.* due to Lynde alone. The learned judge came to the conclusion that the plaintiff's answer in that respect was well founded in fact. I am of opinion that he was in error there. It seems to me clear, having regard

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to the terms of the mortgage deed and the account furnished by the plaintiff, that the receiver was in fact appointed in respect of both sums. Then the question arises how much he has received in respect of the sum of 900*l.* and interest thereon, and how much remains due in respect thereof. There is a controversy as to this on the affidavits. The defendant says that he does not know and cannot get an account of what has been so received. The question is whether, under those circumstances, the case is one for the application of the provisions of Order XIV. There appears to me to be upon the evidence before us a doubt as to the amount for which the plaintiff is entitled to judgment. The case of *Poulett* v. *Hill* (1), which was cited by the defendant's counsel, though it differed in its facts from the present case, certainly appears to carry him a good way in his argument. I do not think that, if a receiver has been appointed in a case where there is a specially indorsed writ and has not received anything, the mere fact of his having been so appointed affords a sufficient answer to an application under Order XIV.; but I think that enough has been shewn in this case to entitle the defendant to defend the action. I am therefore of opinion that the order of the judge should be set aside and leave to defend given.

Appeal allowed.

Solicitors for plaintiff: *Bower, Cotton & Bower, for Lynde & Branthwaite, Manchester.*

Solicitors for defendant: *Robbins, Billing & Co., for J. H. Lea, Manchester.*

(1) [1893] 1 Ch. 277.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1895
June 18.

CHATTERTON *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

Defamation—Privilege—Communication made by Officer of State in course of Official Duty—Vexatious Action.

A communication relating to state matters made by one officer of state to another in the course of his official duty is absolutely privileged and cannot be made the subject of an action for libel.

APPEAL from the order of a Divisional Court (Mathew and Day JJ.) dismissing an action as vexatious.

The action was for libel. In the statement of claim the plaintiff claimed "damages for libel from the defendant in that he conveyed or caused to be conveyed in writing to the Under-Secretary of State untrue statements affecting the professional reputation of the plaintiff, a captain in Her Majesty's Indian Staff Corps, saying that in a dispatch in the defendant's possession the Commander-in-Chief in India and the Government of India recommended the removal of the plaintiff to the half-pay list as an officer whose retention on the effective list was in every way most undesirable, well knowing the same to be false and that no such statement existed in the said dispatch, with intent to prevent the investigation of parliament, causing the Under-Secretary to publish the said libel on the plaintiff to the House of Commons and in the public press." It appeared that the statement complained of was made by the Secretary of State for India to the Parliamentary Under-Secretary for India in order to enable him to answer a question asked in the House of Commons with regard to the treatment of the plaintiff, an officer in the Indian Staff Corps, by the Indian military authorities and Government. The Master had made an order dismissing the action as vexatious. This order was affirmed on appeal by the judge at chambers and subsequently by the Divisional Court.

The plaintiff in person.

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J. R. Paget, for the defendant. The action cannot possibly be maintained. In the first place, it appears to be brought against the defendant, not in his personal character, but in his official capacity as representing a department of the Government, and it is clear that no such action will lie. But, assuming that it is brought against him personally, the communication made by the defendant to the Under-Secretary of State for India, being made by one state official to another in the course of his official duty, was absolutely privileged. Secondly, the authorities shew that on grounds of public policy the Court will not allow such a document to be produced in evidence or secondary evidence of it given, and, therefore, if the action were allowed to proceed, the plaintiff must fail at the trial. As the action is wholly misconceived and cannot possibly succeed, it ought to be dismissed as vexatious. [He cited *Anderson* v. *Hamilton* (1); *Home* v. *Bentinck* (2); *Hennessy* v. *Wright* (3); *Grant* v. *Secretary of State for India* (4); *Dawkins* v. *Lord Rokeby* (5); *Dawkins* v. *Paulet* (6); *Stace* v. *Griffith* (7); *Kinloch* v. *Secretary of State for India* (8); *Gidley* v. *Lord Palmerston*. (9)]

LORD ESHER M.R. The plaintiff in this case has brought an action of libel against the Secretary of State for India in Council. It would seem from the form of the action that it is meant to be brought against him in his official capacity, treating him as a corporation, not against him personally. But it would have made no difference if it had been brought against him as an individual. The substance of the case is that it is an action brought against him in respect of a communication in writing made by him as Secretary of State, and, therefore, a high official of the state, to an Under-Secretary of State in the course of the performance of his official duty. The master, the judge at chambers, and the Divisional Court have all come to the con-

(1) 2 B. & B. 156, n.
(2) 2 B. & B. 130.
(3) 21 Q. B. D. 509.
(4) 2 C. P. D. 445.
(5) L. R. 8 Q. B. 255; L. R. 7 H. L. 744.
(6) L. R. 5 Q. B. 94.
(7) L. R. 2 P. C. 420.
(8) 15 Ch. D. 1; 7 App. Cas. 619.
(9) 3 B. & B. 275.

clusion that the action is one which cannot by any possibility be maintained; that it is not competent to a civil Court to entertain a suit in respect of the action of an official of state in making such a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it. I think that conclusion was correct. The authorities which have been cited to us appear to shew that, as a matter of clear law, a judge at the trial would be bound to refuse to allow such an inquiry to proceed, whether any objection be taken by the parties concerned or not. It follows that such an action as this cannot possibly in point of law be maintained; and, that being so, to allow it to proceed would be merely vexatious and a waste of time and money. The reason for the law on this subject plainly appears from what Lord Ellenborough and many other judges have said. It is that it would be injurious to the public interest that such an inquiry should be allowed, because it would tend to take from an officer of state his freedom of action in a matter concerning the public weal. If an officer of state were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence necessary for the performance of his functions as an official of state. Therefore the law confers upon him an absolute privilege in such a case. I shall not go through the authorities which have been cited. In all of them the law seems to have been stated to the same effect, and it seems to me to be accurately summed up in Fraser on the Law of Libel and Slander, p. 95, where he says, after stating that no action lies in respect of a defamatory statement in a report made in the course of military or naval duty, "For reasons of public policy the same protection would, no doubt, be given to anything in the nature of an act of state, e.g., to every communication relating to state matters made by one minister to another, or to the Crown." I adopt that paragraph as stating the law correctly. In my opinion, the statement of

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which the plaintiff complains, being a communication relating to a state matter made by one state official to another, was absolutely privileged. For these reasons, I think the order of the Divisional Court was right, and should be affirmed.

KAY L.J. I am of the same opinion. I will assume that the statement of claim sufficiently alleges that the statement made by the defendant, of which the plaintiff complains, was untrue, and that it was made with malicious intent. But, assuming that to be so, the question arises whether under the circumstances that statement is not absolutely privileged, and therefore one upon which no action can be founded. The statement complained of appears upon the plaintiff's own shewing to have been made by the Secretary of State for India to an Under-Secretary of State upon an occasion when a question was about to be raised before the House of Commons as to whether the plaintiff had been properly dealt with by the military authorities in India or not, in order that the Under-Secretary might answer that question on behalf of the department of the Government which he represented. I cannot conceive of anything which would more clearly be an act of state than the making of such a statement. A question is raised before the House of Commons which the representative of a department of the Government in the House has to answer, and the head of the department communicates to his subordinate the answer which he wishes to be given. I cannot see how the business of government could be carried on if such a statement were the subject of an action for libel. In this case the plaintiff has mistakenly brought his action against the defendant in his official capacity; but the result would be just the same if he had brought it against him in his personal character. I do not find any authorities nearer to the present case than the cases of *Anderson* v. *Hamilton* (1) and *Home* v. *Bentinck*. (2) In *Anderson* v. *Hamilton* (1) the action was for false imprisonment, and objection was taken by the defendant's counsel to production of a letter forming part of a correspondence which had passed in relation to matters of state between the Secretary of State for the Colonial Department and a person acting as the representative

(1) 2 B. & B. 156, n.

(2) 2 B. & B. 130.

of Her Majesty's Government. The argument seems to have been that such a correspondence was absolutely privileged on the ground that the public interest rendered it necessary that it should not be disclosed. Lord Ellenborough said: "I do not like breaking in upon this correspondence; it might be pregnant with a thousand facts of the utmost consequence respecting the state of the Government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance. Then it is said the fact that there has been a complaint made against the defendant by the plaintiff to Lord Liverpool is the only fact sought to be put in evidence on this occasion; but it is not competent to the plaintiff to get at that fact, if it be embodied in an official letter. Neither can an extract of such a letter be admitted, for the plaintiff must be entitled to the whole or none; and I think that the whole of this letter is not admissible on account of the objections taken." It is quite true that the question actually decided in that case was merely as to the admissibility in evidence of the letter, the decision being that neither could the letter be produced nor could secondary evidence of its contents be given. But the ground of that decision seems to me to involve the result that such a communication is an act of state in respect of which, even if secondary evidence of it could be given, no action can be maintainable. In the case of *Home* v. *Bentinck* (1) it was decided that a report made by the president of a court of inquiry directed to be held by the Commander-in-Chief to inquire into the conduct of an officer in the Army was a privileged communication, and that it was properly rejected as evidence at the trial of an action for libel, and that an office copy of it was also properly rejected. That decision also seems to me to involve the conclusion that, even if such a document could be put in, it would be absolutely privileged and no action could be founded upon it. Dallas C.J. said, in giving judgment: "The evidence in question was the result of the inquiry made by the court, delivered by the defendant to the Commander-in-Chief in the exercise of his military duty, and retained by the Commander-in-Chief, as an official document in the possession of the Secretary, Sir Henry

(1) 2 B. & B. 130.

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Torrens. It originated, therefore, in a military order of a person holding a high and responsible office under the Crown; it was executed in consequence of that order; it was returned and deposited in that place in which all official acts of such a description are to be deposited; and the question then is, whether, under these circumstances—I will not say Sir Henry Torrens would have been *compelled* to produce the results of this inquiry—but whether, if he, under a mistake, had been disposed so to do, it would not have been the bounden duty of the learned judge before whom the cause was tried, considering that this document was a secret, not the privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interfered and prevented the admission of such evidence. Now, before I examine the few instances alluded to as applying to cases of this description, let us see upon what ground and principle the present case rests. It is agreed that there are a number of cases of a particular description in which, for reasons of state and policy, information is not permitted to be disclosed." What was said in that case appears to me authority for the proposition that a document such as that upon which this action is founded is one which cannot form the subject-matter of an action, because, on the ground of public policy, the Court cannot allow it to be given in evidence, or secondary evidence of it to be given. It is clear law that for a statement made in Parliament no action of slander will lie; and it appears to me that on the same principle this action cannot be maintainable.

I think we might dismiss this action as vexatious, independently of any question of privilege, upon the ground that the plaintiff must fail at the trial, because he could not prove the libel, not being able to compel production of it, or to give secondary evidence of it; but I prefer to put my decision on the broad ground that what the defendant did was an act of state, and as such is absolutely privileged. The passage which has been referred to from Fraser on the Law of Libel and Slander appears to me accurately to state the law on the subject, though no particular case is there cited in support of the doctrine laid down. For these reasons I am of opinion that the appeal should be dismissed.

A. L. SMITH L.J. In this case the plaintiff has brought an action against the Secretary of State for India in Council, and the question is whether the action is vexatious and therefore ought to be dismissed. It was argued by the defendant's counsel that it ought to be dismissed on two grounds. The first which he relied upon was that the statement complained of, having been made by the Secretary of State to the Under-Secretary of State for the purpose of giving the latter the information necessary to enable him to answer a question asked in the House of Commons, was a statement made in the course of the performance of the defendant's official duty, and was therefore absolutely privileged. I cannot find any case which exactly covers this; but, having regard to the ratio decidendi in the cases of *Anderson* v. *Hamilton* (1), *Home* v. *Bentinck* (2), and *Dawkins* v. *Lord Rokeby* (3), I think the result is that, under circumstances such as exist in the present case, there is an absolute privilege. But there is a second ground upon which the defendant's counsel relied, and which, I think, is conclusive of the matter—namely, that the libel complained of is a document of state, it having been brought into existence by the defendant in the course of his duty as a state official for a state purpose, and therefore it cannot be produced in evidence in a court of justice, it being contrary to the public interest that it should be so produced. The cases have gone the length of holding that, even if no objection were taken to the production of such a document by the person in whose custody it was, it would be the duty of the judge at the trial to intervene, and to refuse to allow it to be produced: and it has further been held that, if an attempt were made to get round that difficulty by giving secondary evidence of its contents, the judge ought also to prevent that from being done. Therefore, if this action were allowed to go on to trial, the plaintiff could not possibly succeed without proving the libel complained of, and the judge would be bound to prevent its being proved. The Divisional Court affirmed the order dismissing this action on the ground that they saw clearly that the action could not by any possibility

(1) 2 B. & B. 156, n. (2) 2 B. & B. 130.
(3) L. R. 8 Q. B. 255; L. R. 7 H. L. 744.

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be maintained, and therefore, in the exercise of the inherent jurisdiction of the Court to prevent abuse of its process, they dismissed it as vexatious. It seems to me that their decision was quite right.

Appeal dismissed.

Solicitor for defendant: *Solicitor to the India Office.*

E. L.

1895

May 27, 29.

ASFAR & CO. *v.* BLUNDELL AND OTHERS.

Ship—Freight—Goods Damaged—Loss of Merchantable Character—Liability to Pay Freight — Marine Insurance — Insurance of Profit—Warranty against Average—Concealment of Material Fact.

A vessel, on board which dates had been shipped under bills of lading making the freight payable on right delivery, was sunk during the course of the voyage, and subsequently raised. On arrival at the port of discharge, it was found that although the dates still retained the appearance of dates, and although they were of considerable value for the purpose of distillation into spirit, they were no longer merchantable as dates:—

Held, that freight was not payable in respect of them.

A ship having been chartered for a lump sum, the charterers put her up as a general ship, and goods were shipped on board under bills of lading at freights which in the aggregate exceeded the charter freight. The charterers insured their "profit on charter" by a policy which contained a warranty against average.

On arrival of the ship, part of the cargo was delivered, and freight was payable under the bills of lading for that portion; but the residue owing to sea damage was in an unmerchantable condition, and freight was not payable for it; with the result that the total amount of the freights payable under the bills of lading was less than the charter freight, and the charterer's profit was consequently lost:—

Held, that there had been a total loss of the subject-matter of the insurance within the meaning of the warranty:

Held, also, that the fact that the charter freight was a lump sum and not a tonnage rate was one which the assured were not bound to disclose, for that the underwriters were put upon inquiry to ascertain the terms of the charter, the profit on which they purported to insure.

ACTION tried before Mathew J. without a jury.

The plaintiffs were merchants carrying on business at Bussorah. The defendants were underwriters in London. On August 4, 1888, the plaintiffs entered into a charterparty with the Pinkney & Sons Steamship Company, owners of the steamship *Govino*,

for the hire of the said ship from Bussorah and/or certain other places in the Persian Gulf to London for a lump sum of 3900*l.*, upon the terms that all freight earned by the ship should be for account of the charterers. The plaintiffs placed the steamer on the berths in the usual way at ports or places in the Persian Gulf, and cargo was shipped by various parties at certain rates of freight under bills of lading which made the freight payable on right delivery. The total of such bill of lading freights amounted to 4690*l.* While the ship was in course of loading, the plaintiffs insured their profit on the charter for 2000*l.* with the defendants, who accepted the risk on slip on or about October 17.

The defendants, when they so agreed to become insurers of the plaintiffs, were not informed of, and did not inquire as to, and did not know any of, the terms or conditions of the charterparty or of the bills of lading, nor that the charter was for a lump sum freight.

On October 23 the formal policy was made out and underwritten by the defendants. By it the plaintiffs were expressed to be insured by the *Govino* for 2000*l.* at and from any ports or places in the Persian Gulf to London. The interest insured was described as "2000*l.* on profit on charter . . . Warranted free from all average." The *Govino* sailed from the last port in the Persian Gulf at which she loaded cargo on or about October 26. After her arrival in the Thames, but before she had reached her discharging dock, and during the voyage mentioned in the policy, she was run into by another vessel, filled with water, and became almost entirely submerged for two or three tides, after which she was raised and docked.

A large portion of the cargo consisted of dates, which were damaged by the submersion. Being saturated with sewage, and in a fermenting condition, they were condemned by the sanitary authority as unfit for human food, and were not allowed to be landed in London. Although they were unmerchantable as dates, a large proportion of them retained the appearance of dates, and notwithstanding that they were unfit for human food as dates, they were of considerable value, and were sold for a sum of 2400*l.* for the purpose of distillation into spirit, and were

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transshipped and exported. The part of the cargo which did not consist of dates was landed and delivered, and the lump freight of 3900*l.* became payable to the owners of the vessel under the charterparty. The total of the bill of lading freights payable on the part of the cargo which was landed amounted to less than 3900*l.* The plaintiffs then brought this action as for a total loss of profit on the charter, claiming 2000*l.* as on a valued policy, or in the alternative 790*l.*, being the difference between the lump freight payable under the charterparty and the total amount of the bills of lading freights.

Joseph Walton, Q.C., for the plaintiffs. No freight was payable in respect of the dates, for the dates had ceased to be dates in a mercantile sense, whatever they may have been in appearance. Where goods arrive in a damaged condition the test whether freight is payable on them is whether they are still merchantable under the description under which they were shipped. Thus where a vessel with a cargo of cement on board was sunk and afterwards raised, when the cement was found to be useless as cement, the shipowners were held not to be entitled to freight: *Duthie* v. *Hilton*. (1) Then if freight was not payable on the dates there was no profit on the charter within the meaning of the policy. The underwriters thereby guaranteed that the total bills of lading freights should exceed the freight payable under the charterparty. That being so, the plaintiffs are entitled to recover 2000*l.*, for the policy must be regarded as a valued policy. At any rate, they are entitled to recover the 790*l.*, the difference between the 3900*l.* and the 4690*l.*

Carver, for the defendants. To entitle the charterers to freight on the dates, it is enough that on arrival the dates existed in specie. In the case of *Duthie* v. *Hilton* (1) the cement had ceased to exist as cement, whereas here the dates were still dates, and it was as dates that they were condemned by the sanitary authority. The test of liability to pay freight is not the fitness of the goods for the use for which they were originally intended. In *Cocking* v. *Fraser* (2) it was held by Lord Mansfield that a

(1) L. R. 4 C. P. 138.

(2) Reported in Park on Insurance, 8th ed. vol. i. p. 247.

cargo of fish which arrived in a stinking condition, and was consequently of no value, could not be regarded as a total loss. But even if freight was payable on the dates, still the defendants are not liable. No doubt in that case the plaintiffs made no profit on the charter; but that is not enough to satisfy the warranty against average. The warranty must be read with reference to the subject-matter of the insurance, and here the subject-matter was a portion of the bills of lading freight; but the portion of it which was so insured was not a separable and specific part of that freight, as would have been the case if the insurance had been on the freight of a specific part of the cargo; it was an inseparable proportion of the whole of the bills of lading freight. And under those circumstances the warranty against average could not be satisfied unless the whole of the bills of lading freight was lost. In the analogous case of an insurance effected by a mortgagor of a ship upon his equity of redemption with a warranty against average, the underwriters would not be liable unless the ship were lost; it would not be enough that she had been damaged so much as to destroy the value of the equity. So an insurance of profit on cargo—that is, of the excess of the arrived value over and above the shipped value—is always treated as an insurance of the goods; and where such profit is insured with a warranty against average the underwriters are not liable unless the whole of the goods are lost—it is not enough that so much has been lost that the profit on the cargo has disappeared: Phillips on Insurance, s. 1503; *Hodgson* v. *Glover*. (1) If, however, the defendants are wrong in their construction of the warranty against average, it was highly material to them that they should be informed whether the charter was for a lump sum or was at a tonnage rate. For if the charter freight had been at a tonnage rate it would only have been payable on so much of the goods as arrived, and the charterers would have gained a profit if any of the goods arrived, namely, the difference between the charter and bill of lading freights on those goods. The loss of profit, therefore, in such case would only have been partial, and the warranty against average would clearly not have been satisfied unless the whole

(1) 6 East, 316.

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bill of lading freight had been lost. The fact that the charter was for a lump sum made all the difference, and ought to have been disclosed, and the policy is void on the ground of concealment of a material fact.

Joseph Walton, Q.C., in reply.

May 29. MATHEW J. This is an action brought to recover for a total loss on a policy on profit on charter. The plaintiffs were charterers of a ship called the *Govino*. The charter was for a lump freight of 3900*l.*, and the ship was to go to ports of loading in the Persian Gulf, there take on board a general cargo, and bring that cargo to London. The charterers anticipated in the employment of the vessel a profit upon the lump sum which they had agreed to pay the shipowners, and that profit they insured. In the slip and in the policy the subject-matter of the insurance is described in the same way as "profit on charter." Although the fact was not known at the time that the insurance was effected, the total of the bills of lading freights amounted to 4690*l.* as against 3900*l.* lump freight payable under the charter, shewing, in the event of the whole of the bills of lading freights being earned, a profit on the charter of 790*l.* The ship took her cargo on board and sailed for the discharging dock in the Thames, but before she reached it she came into collision with another vessel and was sunk, and the cargo remained under water during three tides. A large part of the cargo, as much as 700 tons, consisted of dates. The vessel was raised and taken into dock. The first question to be decided in this case is whether any freight was payable in respect of the dates. If it was, then there was a profit on the charter freight. If none was payable, there was no profit. Whether or not freight was payable on the dates depended upon their condition. The evidence went to shew that they were saturated with sewage and were in a state of fermentation and putrefaction, and were unquestionably unmerchantable as dates. It was indeed suggested that they still retained the appearance of dates; but if by that suggestion was meant that nothing less than total destruction of the goods would disentitle the shipowner to receive his freight, I can only say that that ancient view of the matter, which was

put forward in *Cocking* v. *Fraser* (1), cannot be treated as law at the present day. Total destruction is not necessary, destruction of the merchantable character of the goods is sufficient; and, in accordance with the principle recognised in *Roux* v. *Salvador* (2), *Dakin* v. *Oxley* (3), and *Duthie* v. *Hilton* (4), I hold that the plaintiffs were not entitled to receive freight in respect of these dates.

The next question is whether the defendants are protected from liability by reason of the clause in the policy, "Warranted free from all average." It was contended by Mr. Carver on behalf of the defendants that the policy was in reality a policy on freight, and that the subject-matter of the insurance was a part of the freight payable on the bills of lading; and it was said that if 50 per cent. of the goods were lost and 50 per cent. arrived, then, inasmuch as presumably 50 per cent. of the bills of lading freight would be earned, there would only be a particular average loss of profit on this policy, and the warranty against average would protect the underwriters. But that argument must go the length of maintaining that the intention of the policy was to afford protection to the assured only in the event of a total loss of all freight. I cannot think that that was what the parties meant. I am satisfied that what was intended to be the subject-matter of the insurance was the charterers' profit on the adventure, that is to say, the excess of the total bills of lading freights over and above the lump freight of 3900*l.*, and the intention was that in the event of a total loss of that profit the assured should be entitled to recover.

The next question is as to the amount which the plaintiffs are entitled to recover. It was contended for the plaintiffs that the policy was a valued policy, and that the interest was valued at 2000*l.* But I think that that contention is not well founded. And as the interest here was in fact only 790*l.*, I think the plaintiffs can recover that sum and no more.

These was one other point which was argued by Mr. Carver: he contended that, if he was wrong in his construction of the

(1) Reported in Park on Insurance, 8th ed. vol. i. p. 247.

(2) 3 Bing. N. C. 266.

(3) 15 C. B. (N.S.) 646.

(4) L. R. 4 C. P. 138.

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warranty against average, it was material to the risk that the underwriters should have been informed that the freight payable under the charter was a lump sum freight and not a tonnage rate, and that the concealment of that fact avoided the policy. I confess I was unable to understand what the materiality of that concealment was. But whether it was material or not I think it is in the present case unnecessary to determine, for it is a well-settled principle of insurance law that underwriters are not entitled to be told what they waive all inquiry about. In this particular case they were told that there was a charter, and if they had wanted to learn the contents of that charter they had only to inquire. They chose to waive inquiry. In accordance then with the principles laid down in *Haywood* v. *Rodgers* (1) and in the judgment of Lord Blackburn in *Inman Steamship Co.* v. *Bischoff* (2), I hold that that contention must fail. I therefore give judgment for the plaintiffs for 790*l.*

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Ince, Colt, & Ince.*

Solicitors for defendant: *Waltons, Johnson, Bubb, & Whatton.*

(1) 4 East, 590.

(2) 7 App. Cas. 670, at p. 678.

J. F. C.

DOWNES, Appellant *v.* JOHNSON, Respondent.

1895
May 21.

Gaming—Place used for Betting—Club—Bets made between Members only—"Betting with Persons resorting thereto"—Betting Act, 1853 (16 & 17 *Vict.* c. 119), ss. 1, 3.

The Betting Act, 1853, s. 1, by which "No house, office, room, or other place, shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . . betting with persons resorting thereto," does not apply to a case where members of a bonâ fide club make bets with each other in the club.

The respondent was charged with an offence against the above Act. The premises in question were owned and occupied by a club, which was registered under the Companies Acts. By the rules each member was required to hold at least one share, and disputes as to bets were settled by a committee. Refreshments and dinners were served in the club, and newspapers provided. Members were in the habit of betting with each other in the club-room, which was used exclusively by members, but no member had any particular place allotted to him. The respondent, who was a member, made bets on the club premises with other members only:—

Held, on a case stated by a magistrate, that the respondent was not guilty of an offence against the Act.

Case stated by an alderman of the City of London.

At the Mansion House justice room twelve informations were, on January 8, 1895, laid by Downes, the appellant, under 16 & 17 Vict. c. 119, against Johnson, the respondent, charging the respondent, under s. 3 of the statute, for that he, being a person using a certain house and place situate at No. 1, Bolt Court, Fleet Street, did unlawfully use the said house and place for the purpose of him, the respondent, using the house and place himself, betting with persons resorting thereto, on certain dates in the year 1894, which were specified in the informations, which informations were heard together by consent, and were determined by the alderman on January 24, 1895, when he dismissed the informations.

The following facts were proved to the satisfaction of the alderman.

The house, No. 1, Bolt Court, Fleet Street, was owned and

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occupied by the Albert Club, Limited, which was registered under the Companies Acts on November 21, 1865. The registered number of shareholders in November, 1894, was 736.

The members of the club were elected by the directors, and their privileges and liabilities as members were set out in the memorandum and articles of association and in the book of rules. Rule 7 required each member of the club to hold at least one share therein. A "dispute book," a "rough dispute book," and a number of documents called "applications as to disputes," were found on the club premises and produced. Those books and documents shewed the disputes which were settled by the committee under rule 12. Those disputes related exclusively to disputed bets between members of the club. A society called the "mutual protection society" was formed by certain members of the club, of whom the respondent was one. The object of the society was the compilation, for the use of its members, of a "black list" of persons who had made default in the payment of bets, or refused to submit disputes as to bets to the decision of any "recognised tribunal." The black list contained the names and addresses of upwards of 2000 persons. By resolution of the directors of the club the secretary of the club was permitted to act as secretary of the society.

The respondent was a member of the club on the dates mentioned in the informations.

On the dates mentioned in the informations various bets were made by the respondent with other members of the club.

The club-room was used exclusively by members. Individual members had no prescribed places or "pitches" in such club-room, and there was no member who could be accurately described as holding "a bag against all comers."

Certain of the members of the club usually laid odds against horses running in horse-races, and certain others of the members usually backed horses so running, but frequently their respective positions were reversed, when the layers became backers and vice versâ.

There was a tape machine in the club-room, enclosed by a railing, within which a servant of the club stood during racing hours, and called out to the members of the club the names of

the horses running as they came up on the tape machine, together with the starting prices of the horses, as shewn by the machine; and thereupon the members of the club made bets upon the horses, either by backing or laying odds against them.

On the days mentioned in the informations the respondent had made numerous bets in the club-room with members of the club, as shewn by his betting-book and eight settling-books.

In the club-room and on the premises there were obtainable by the members of the club newspapers, time-tables, &c., and refreshments of various kinds, including two club dinners daily. There was also a billiard-table in the club-room, which was used by members of the club.

Evidence on the part of the appellant was tendered with a view to prove that persons who were not members of the club were admitted into the lobby of the club, and that the respondent, on being called out by the door-keeper to see such persons, made bets with them within such lobby.

The alderman found that the charge against the respondent of betting with non-members within the Albert Club premises had not been established, and he was of opinion, in construing the words in the Act, "betting with persons resorting thereto," that such persons were clearly distinguishable from the owners or occupiers of any "house, office, room, or other place," and consequently, upon the facts before him, he acquitted the respondent of the charge of unlawful betting under 16 & 17 Vict. c. 119.

The question for the opinion of the Court was, whether the alderman, upon the above statement of facts, came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

Poland, Q.C. (*C. W. Mathews* and *R. D. Muir* with him), for the appellant. The respondent ought to have been convicted. It cannot be contended that the Act makes all betting illegal, but the effect of the alderman's decision in the present case will be that any one member may go to the club every day throughout the year, and lay the odds with all the other members.

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Such a state of things is within the mischief of the Act. (1) It is difficult to see any distinction between the present case and cases relating to race-courses, to which the statute has been held to apply: *Eastwood* v. *Miller* (2); *Haigh* v. *Town Council of Sheffield*. (3) The same observation applies to cases relating to public-houses and beerhouses: *Hornsby* v. *Raggett* (4); *Reg.* v. *Brown*. (5) The members of the club go to the club-house, and, being there, bet with other members who go there. That amounts to using the premises for the purpose of betting with persons resorting thereto. The case is therefore within the exact words of the statute.

[WRIGHT J. Where is the line to be drawn?]

It is a question of degree, depending on the facts of each case. *Oldham* v. *Ramsden* (6), which is relied on for the respondent, is not in point, for it only amounts to a decision that in that particular case the plea was not proved by the evidence.

[He also referred to *Wright* v. *Clarke* (7); *Reg.* v. *Cook* (8); *Jenks* v. *Turpin* (9); *Reg.* v. *Preedy* (10); *M'William* v. *Dawson*. (11)]

Joseph Walton, Q.C. (*Avory*, with him), for the respondent. The conclusion arrived at by the alderman amounts to a finding of fact that this was a bonâ fide club. There is no authority which exactly covers the present case, but *Oldham* v. *Ramsden* (6), so far as it goes, is strongly against the appellant's contention. The facts of that case are very like those found here.

[He was stopped by the Court.]

(1) The Betting Act, 1853 (16 & 17 Vict. c. 119). By s. 1, "No house, office, room, or other place, shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of, such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto." Sect. 3 imposes a penalty not exceeding 100*l*.

(2) L. R. 9 Q. B. 440.
(3) L. R. 10 Q. B. 102.
(4) [1892] 1 Q. B. 20.
(5) [1895] 1 Q. B. 119.
(6) 44 L. J. (C.P.) 309.
(7) 34 J. P. 661.
(8) 13 Q. B. D. 377.
(9) 13 Q. B. D. 505.
(10) 17 Cox, C. C. 433.
(11) 56 J. P. 182.

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GRANTHAM J. This case raises a question of some importance on the Betting Act, 1853 (16 & 17 Vict. c. 119). In my opinion we have no right to stretch the law, so as to make an Act of Parliament cover cases to which it cannot have been intended to extend. Some light is thrown on the object and intention of the statute by the words of the preamble, which were (1) as follows: "Whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies." These words seem to me to make it clear that the Act is aimed at houses or offices kept by persons who receive money from improvident persons who come in and pay money in order to back horses. This is not like the case of a number of persons who join together and form a club, even though it may be the fact that betting is intended to be, and is, carried on in such club. Mr. Poland frankly admitted that all betting is not made illegal by the Act. The object is only to stop some kinds of betting which are considered specially mischievous. A man who joins a club such as this would know what to expect, and could not be looked upon as one of the class of improvident persons who are specially aimed at by the statute. The position of the respondent in the present case is that he is a member of a regular club, where dinners are served, and newspapers are provided for the use of the members. The fact that other members of the club go there and bet, and the respondent bets with them, can give us no right to strain an Act of Parliament which was passed for a different purpose, so as to make it apply to a case like the present. Mr. Poland says it is a question of degree, but the answer to that is, where are we to draw the line? The transaction is either wholly illegal or it is wholly legal. There is no decision to be found, nor is there any expression of opinion in any of the cases, which at all bears out the contention on behalf of the appellant.

(1) The preamble is repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

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For these reasons I am of opinion that our judgment ought to be in favour of the respondent, with costs.

WRIGHT J. On looking into the case stated, it is apparent that the question really intended to be raised is, whether on the evidence the alderman was at liberty to hold that this club was a bonâ fide association, and therefore not within the terms of the statute. There is no finding or suggestion in the case that it was a mere blind. If it were a place to which anyone who chose, or any person who was believed to be solvent, could obtain admission, no doubt the result might have been different; but on the facts and findings in the case, I agree that the respondent is entitled to succeed.

Judgment for the respondent.

Solicitor for appellant: *H. H. Crawford, the City Solicitor.*
Solicitors for respondent: *Lewis & Lewis.*

P. B. H.

1895
June 17.

KERSHAW *v.* TAYLOR.

Metropolis—Management Acts—Sewer—Drain—Liability to Repair—Effect of Builder's Disobeying Order of Sanitary Authority — Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

Under the Metropolis Local Management Act, 1855, the duty of repairing sewers lies on the sanitary authority, that of repairing drains on the owner of the house; and by the same Act a drain, which, without an order of the sanitary authority in that behalf, drains more than one house, is a sewer.

A builder in 1887 built in the metropolis four houses which he, contrary to the directions of the sanitary authority, caused to be drained into one drain. He subsequently sold the houses to different purchasers. In a proceeding to compel the purchaser of the premises, in which the drain which so received the drainage of the four houses was situate, to repair the drain for the purpose of remedying a nuisance caused by its defective condition:—

Held, that the purchaser was not estopped by the wrongful act of his predecessor in title from alleging that the drain in question was a sewer, and that the duty of repairing it consequently lay not on him but on the sanitary authority.

CASE stated by a metropolitan police magistrate.

On August 30, 1887, one Gatfield, a builder, gave written notice to the board of works for the Wandsworth district of his

intention to build six semi-detached houses in Tankerville Road, Streatham, within their district, and attached to that notice a plan shewing the system of drainage proposed, according to which the drainage of each pair of houses was to be carried by a single drain into the sewer. The board sanctioned the plan of drainage. Gatfield proceeded to build the houses, but improperly and without the permission of the board, connected the drainage of two pairs of the houses, called respectively "Clyde" and "Avon," "Wye" and "Severn," and from the point of junction carried the drainage of the four houses into the sewer by means of a single drain, which was situated wholly within the premises called "Avon." He subsequently sold the said four houses to different purchasers without notice that the drainage system was in contravention of the approved plan. The respondent eventually became the owner of "Avon." On October 5, 1894, the appellant, who is the sanitary inspector for Streatham, visited the premises called "Avon," and found that a nuisance existed upon the premises owing to defective drainage. He thereupon served a notice on the respondent requiring him to abate the nuisance, and for that purpose to do certain works connected with the drainage and specified in the notice.

The respondent opened the ground for the purpose of doing the work when he discovered that the drain running through his premises received the drainage not only of "Clyde," but also of "Severn" and "Wye." He accordingly refused to repair the drain beyond the point where it received the drainage of "Severn" and "Wye," contending that from that point it was a sewer (1), and as such vested in the board, and that he was consequently not liable to repair it. Subsequently the owner of

(1) By 18 & 19 Vict. c. 120, s. 68: All sewers in any district, except main sewers, are to be vested in the district board.

By s. 69: The district board are from time to time to repair the sewers vested in them.

By s. 85: If any drain appears to be in bad order or condition, the board may require the owner or occupier to do the necessary works.

By s. 250: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only . . . and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies."

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the premises known as "Severn" disconnected the drainage of his house from the drainage system of the other houses, and caused it to be carried directly into the sewer by a separate drain. But the other three houses continued to be drained as theretofore. The nuisance continuing to exist the appellant on January 21, 1895, took out a summons against the respondent charging that there existed on the premises known as "Avon," by reason of the act, default, and sufferance of the respondent, a nuisance, namely, a foul and defective combined drain and house drains connected therewith. The magistrate held that inasmuch as the drainage system existing on the premises had never been approved by the board, the drain in question was a sewer from the point where it received the drainage of the premises known as "Wye," and he accordingly dismissed the summons subject to a case for the opinion of the Court.

Channell, Q.C., and *Earle*, for the appellant. It cannot be that the wrongful act of a builder in laying out the drains in contravention of the plan approved by the board can impose on the public the obligation to repair this drain, which, if he had obeyed the board's orders, would have lain upon the owner. It may be that this literally comes within the definition of a sewer within s. 250 of the Metropolis Local Management Act, 1855, but as a man cannot take advantage of his own wrong, the builder Gatfield if he were before the Court would be estopped from so contending; and if the builder would be so estopped his successors in title must equally be estopped.

[WRIGHT J. The remedy of the board is surely to proceed under s. 83 of the Act of 1855, by which in case any drain be found on inspection not to have been made according to the directions of the board, the person so offending shall forfeit any sum not exceeding ten pounds; and in case the person so making any drain contrary to the directions of the board do not within fourteen days after notice in writing cause the drain to be altered in conformity with the directions of the board, the board may cause the work to be done, and the expenses thereof shall be paid by the person who has so offended. (1)]

(1) The learned judge's citation selects the material parts of the section; its terms are much longer.—F. P.

That remedy here is valueless, for the houses were built twenty years ago, and the builder may be dead.

R. Bray, for the respondent. The appellant cannot succeed unless this is a drain. But to bring it within the definition clause the drainage system of these houses must have been executed under an order of the board. No doubt in *Bateman* v. *Poplar Board of Works* (1) the Court of Appeal held that an approval is an order for that purpose: but what the board approved here was something very different from what was done. The board may be without remedy, but the argument of hardship is of no value. [He was stopped.]

WRIGHT J. It is unfortunate that the Metropolis Management Acts are not more complete than they are, but in the present case it seems to me that the local authority are without remedy. If the manner in which these drains were constructed had been discovered at the time the houses were built, they would have had abundant remedy against the builder under s. 73, under which if a house is found not to be drained with a sufficient drain the board may require the owner of the house to make a sufficient drain, and in the event of his failing to make it, may do the work themselves and recover the expenses from the owner. And even now if they could find the builder, and are not barred by any statute of limitations, they would have a similar remedy under s. 83. They could say to him: "We ordered you to make a drain and not a sewer. You did not follow our directions, and must therefore make a drain now in the way in which it was ordered to be made." The obligation, however, which it is sought to enforce against the respondent is under a different section, s. 85, which only applies where the thing to be repaired is actually a drain and not a sewer. And here the thing is actually a sewer within the definition clause. But it was contended by Mr. Channell that there was something in the nature of an estoppel to prevent the respondent from setting up that this was not a drain. In order to establish such an estoppel it must be shewn that there was some representation made by his predecessor in title the builder, upon the faith of which the

(1) 33 Ch. D. 360.

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board acted to their prejudice. But there was nothing in the nature of a representation made by the builder. There was simply a failure on his part, intentional or otherwise, to construct a drain in the manner authorized. I think, therefore, that the magistrate was right in the conclusion at which he arrived.

KENNEDY J. concurred.

Appeal dismissed.

Solicitors for appellant: *Young & Sons.*
Solicitor for respondent: *Griffinhoofe & Brewster.*

J. F. C.

C. A.

1895

June 24.

[IN THE COURT OF APPEAL.]

LOFTUS *v.* HERIOT.

Husband and Wife—Judgment against Married Woman—Restraint on Anticipation—Arrears of Income due at date of Judgment—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 1, 2, 3, 4; *s.* 19.

Where a married woman has separate property subject to a restraint on anticipation, the restraint applies to income which has become due, but has not yet been paid to her; and therefore such income cannot be made available in execution upon a judgment against her, even although it had accrued due at the date of the judgment.

Hood Barrs v. *Cathcart* ([1894] 2 Q. B. 559) followed.

APPEAL of defendant from an order of Day J. at chambers.

Judgment in the action, which was for goods sold and delivered, had been signed against the defendant, a married woman, on November 15, 1892, in the form sanctioned by the judgment in *Scott* v. *Morley*. (1) By a marriage settlement made upon the marriage of the defendant in 1872, it was provided that the trustees should pay the income of the trust funds to the wife for her life, but during the coverture for her separate use and without power for her to anticipate the same. It appeared that at the date of the judgment there was income of the trust funds which had accrued due, and that such income had not been paid over by the trustees to the defendant. The order appealed against appointed a receiver of the income of the defendant

(1) 20 Q. B. D. 120.

accrued due and payable at or before the date of the judgment in the action sufficient to satisfy the judgment debt and costs. The plaintiff had assigned the judgment debt to another person.

Macaskie, for the defendant. This case is concluded by the judgments of the Court of Appeal in the second appeal in *Hood Barrs* v. *Catheart* (1) and in *Pilkers* v. *Edwards*. (2) The ground of the decision in those cases distinctly was that the restraint on anticipation continued until the money had come into the hands of the married woman. In *Cox* v. *Bennett* (3), which will be relied on for the plaintiff, the point now raised was not argued; and therefore the case is hardly an authority on the point.

Oswald, *Q.C.*, and *Bartley Denniss*, for the assignee of the judgment debt. *Hood Barrs* v. *Catheart* (1) is distinguishable. In that case the income which it was sought to render available to satisfy the judgment had not accrued due until after the date of the judgment. There are, it is true, certain dicta in the judgment delivered by Kay L.J. in the second of the two appeals in that case which tend to shew that the restraint on anticipation continues till the income reaches the hands of the married woman; but those dicta were not necessary for the decision of the case, and are not binding on the Court. In *Pilkers* v. *Edwards* (2) the Court seems to have supposed that this point had been decided by *Hood Barrs* v. *Catheart* (1), which is not really the case. If the point now raised was decided in *Hood Barrs* v. *Catheart* (1), the judgments of the Court on the two appeals in that case were inconsistent, because in delivering the judgment of the Court in the first appeal Davey L.J. expressly said that the Court did not decide that point or express any opinion upon it. The dicta in the judgment delivered by Kay L.J. are inconsistent with previous authorities, which shew that the restraint on anticipation is gone in respect of income that has already become due and payable to the married woman. [They cited on this point *Moore* v. *Moore* (4); *Harnett* v. *M'Dougall* (5);

(1) [1894] 2 Q. B. 559.
(2) W. N. (Dec. 8, 1894) 212; 71 L. T. 788.
(3) [1891] 1 Ch. 617.
(4) 1 Coll. 54.
(5) 14 L. J. (Ch.) 173.

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In re Brettle (1); *Pemberton* v. *M'Gill* (2); *Hyde* v. *Hyde* (3); *Fitzgibbon* v. *Blake* (4); *Claydon* v. *Finch* (5); *Draycott* v. *Harrison* (6); *Cox* v. *Bennett*. (7)]

[KAY L.J. referred to *Baggett* v. *Meux*. (8)]

If there are decisions of the Court of Appeal which are not consistent with one another, the Court is at liberty to follow whichever of the decisions they may think the soundest.

LORD ESHER M.R. The first question is whether this case is not concluded by previous decisions of this Court. I do not wonder that there has been considerable doubt as to the effect of what took place in the earlier applications in the case of *Hood Barrs* v. *Catheart* (9), owing to the fact that the defendant insisted on arguing her own case. But ultimately in that case two appeals came before this Court with regard to two orders appointing a receiver of rents of the defendant's estate, dated respectively April 3 and April 11, 1894; and in each appeal the Court, thinking the questions raised of great importance, took time before delivering judgment in order that all the points involved might be carefully considered. They were so considered by all the judges who heard the appeals; and on the same day judgments were given in both appeals. It has been suggested that those judgments are in conflict with one another; but, in my opinion, when they are looked at, it appears that there is no ground for that suggestion. Furthermore, it is said that there are previous decisions of the Court of Appeal with which the judgment of the Court delivered by Kay L.J. in the second of those appeals is in conflict; and that, if there are conflicting decisions in the Court of Appeal, the Court may consider whether they will not abide by their earlier rather than their later decision. That may be true; but, when a point has been so carefully considered for the purposes of the later decision as was the case in *Hood Barrs* v. *Catheart* (9), I should say that, if

(1) 2 D. J. & S. 79.
(2) 1 Dr. & Sm. 266.
(3) 13 P. D. 166.
(4) 3 Ir. Ch. Rep. (N.S.) 328.
(5) L. R. 15 Eq. 266.
(6) 17 Q. B. D. 147.
(7) [1891] 1 Ch. 617.
(8) 1 Ph. 627.
(9) [1894] 2 Q. B. 559.

that decision really differs from previous decisions, it would be the later decision by which the Court would abide. For the purposes of the doctrine laid down in *Hood Barrs* v. *Cathcart* (1), it appears to me that the period of time to be looked at must be the time when some one is seeking to get hold of the separate property of the married woman, not the date of the judgment; and I do not see that any valid distinction can be drawn between that case and the present on the ground that in this case the income in question was due at the date of the judgment. It seems to me that, if the income could be taken in this case, it would in effect be as much anticipation as if the income had become due after the judgment. So far from being persuaded that the judgment delivered in the second appeal in *Hood Barrs* v. *Cathcart* (1) was wrong, I am still of opinion that it was perfectly right; so, even if I thought we had the power of overruling that decision on the ground that it is in conflict with previous decisions, I should deliberately abide by it. But I am not prepared to allow that it is in conflict with previous decisions. Most of the decisions cited in this case were most carefully considered and dealt with in that judgment; and we came to the conclusion that there was no previous decision on the question which was really in conflict with the judgment we were then giving. It may be that this is a proper question to be taken to the House of Lords; but in this Court I think we must abide by that judgment. I was disposed to say that, if income were paid to an agent authorized by the married woman, that might for this purpose be equivalent to a receipt of it by herself; and I will not say that that is not so; but I am somewhat alarmed by the argument that, if it be so, the husband might be such an agent; for the effect of that would be, I think, practically to deprive the married woman of the protection which it was the object of the restraint on anticipation to afford. But no such question arises; and in this case it is enough to say that we must stand by the judgment which we gave in *Hood Barrs* v. *Cathcart* (1), and hold that the restraint on anticipation is not gone until the money has come to the hands of the married woman. For these reasons I think the appeal must be allowed.

(1) [1894] 2 Q. B. 559.

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KAY L.J. In this case a judgment was obtained against a married woman in the ordinary form sanctioned by the decision in *Scott* v. *Morley*. (1) The trustees of the marriage settlement then had, and still have, in their hands certain income due to her. The judge at chambers has made an order appointing a receiver of that income, which is now appealed against. By the marriage settlement it is provided that the income of the trust funds shall be paid to the wife for life, but during the coverture for her separate use and without power for her to anticipate the same. The question is whether this case is governed by the decision in the second appeal in *Hood Barrs* v. *Cathcart* (2), for, if so, it appears to me that the Court cannot decide it otherwise than that case was decided. In that case, as appears from the report, there were two similar appeals which came before the Court of Appeal, the Court being differently constituted on the two occasions. The first appeal was heard before the Master of the Rolls, A. L. Smith L.J. and Davey L.J.; the second appeal before the Master of the Rolls, myself, and A. L. Smith L.J. The judgments were delivered on the same day—in the first appeal by Davey L.J., in the second by myself. In both appeals the question was whether, in a case where a married woman had separate property which she was restrained from anticipating, income accruing due after the date of the judgment could be made available by way of execution to satisfy the judgment debt. It was held in both cases that it could not. In the judgment delivered by Davey L.J. he said: "For the purpose of this judgment we have assumed that the restraint on anticipation was gone as to the rents in arrear; but we must not be taken to decide that point or express an opinion upon it." The other judgment, which was read by myself, deals with that question, and distinctly expresses the opinion that the restraint on anticipation is not gone until the money is actually or in effect in the hands of the married woman, and the mere fact that it has become due does not make it free separate property. That was certainly one and the main ground of the decision of the Court in the second of the two appeals in that case. This question was therefore considered by all the judges engaged in the decision

(1) 20 Q. B. D. 120.

(2) [1894] 2 Q. B. 559.

of that appeal. The question is whether there is any difference between that case and the present. The only difference is that in the present case the income was in arrear at the date of the judgment. I do not see that that makes any real difference. By the Married Women's Property Act, 1882, s. 1, sub-s. 4, "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Therefore, when the question is whether separate property is bound by the judgment, it does not seem to matter whether it was acquired before or after the judgment. It is clear that the Court treated the matter on this footing, because in the case of *Pillers* v. *Edwards* (1), where there was income of separate property of the married woman in arrear at the date of the judgment, the Court held distinctly, though with some reluctance on the part of Lindley L.J., that they were bound by the decision in *Hood Barrs* v. *Cathcart* (2), and that arrears of income due at the date of the judgment are as much protected as arrears which have accrued subsequently. The judgment in *Hood Barrs* v. *Cathcart* (2) decided a question as to which there had been some conflict of authority. In some cases it had been held that the married woman might, after the income which she was restrained from anticipating had become due, make an assignment of it. That, no doubt, looks as if the restraint on anticipation was gone. Therefore I agree that the question might fairly be taken to the House of Lords. But the question was not really brought so prominently before the Courts until the practice of appointing a receiver of income of separate estate by way of enforcing a judgment against a married woman came into use. I do not think that among the previous cases any can be found in which a judgment was so enforced against arrears of income of separate estate subject to a restraint on anticipation, even when such arrears had accrued due at the date of the judgment; and the Court has again and again held since the case of *Hood Barrs* v. *Cathcart* (2) that neither arrears due at the date of the judgment

(1) W. N. (Dec. 8, 1894) 212; 71 L. T. 788. (2) [1894] 2 Q. B. 559.

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nor arrears accruing due afterwards can be made available to satisfy the judgment by any process. It has been pointed out that, if they could be made so available, it would practically be destroying the protection intended to be given to married women. I think there is no valid distinction between this case and the recent decisions on the subject in *Hood Barrs* v. *Catheart* (1), and subsequent cases by which I think we are bound. For these reasons, I think, the appeal must be allowed.

A. L. SMITH L.J. The question in this case is whether income of a married woman subject to a restraint on anticipation becomes free separate property as soon as it has accrued due to her, or only when it has in fact come into her hands. That question has of late been raised on many occasions. I should think that, if the income came into the hands of an agent of the married woman, though not perhaps if that agent were her husband, that would be equivalent to its coming into her own hands; but it is not necessary to decide whether that is so in this case. There were many previous applications in the case of *Hood Barrs* v. *Catheart* (1), in which, owing to the fact that the defendant insisted on conducting her own case, the points raised were most unintelligible; and the first occasion on which this question was really gone into was when the appeals in the case against the orders of April 3 and April 11, 1894, appointing a receiver of certain rents of the defendant's separate estate, came before this Court. In each of those appeals time was taken to consider the judgment, and written judgments were prepared in the two appeals respectively—one by Davey L.J., the other by Kay L.J. The latter, which as well as the former was the deliberate judgment of the whole Court, dealt with the very point now raised, and decided the question as to the time till when the restraint on anticipation continues. We came to the conclusion, notwithstanding some conflict of authority, that the restraint on anticipation continues until the money has come into the hands of the married woman. Attempts have been made on subsequent occasions to induce this Court to depart from that decision, but

(1) [1894] 2 Q. B. 559.

without success. As I said in the case of *Pillers* v. *Edwards* (1), I feel bound by our deliberate judgment in *Hood Barrs* v. *Cathcart* (2), to which I was a party, and which this Court, in my opinion, has no power to overrule. If that judgment was wrong, it can only be set right by the House of Lords.

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Appeal allowed.

Solicitors for the plaintiff: *Hood Barrs & Co.*

Solicitors for the defendant: *Crossman & Prichard, for Dunlop, Berwick-on-Tweed.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1895 *May* 28.

DAVIS, APPELLANT: BOARD OF WORKS FOR GREENWICH DISTRICT, RESPONDENTS.

Metropolis—Management Acts—"New Street"—Paving Expenses—Apportionment—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.

Sect. 112 of the Metropolis Management Act, 1862, does not restrict the meaning of the expression "new street," and therefore that expression, as used in the Metropolis Management Acts, includes a new street in the ordinary and popular sense of the term.

A road, which was a turnpike road down to 1865 and previously to 1869 of a rural character, subsequently became a new street in the ordinary sense of the term by the erection of buildings alongside it:—

Held, that it was within the terms of s. 105 of the Metropolis Management Act, 1855, and that therefore the district board might pave it under that section and charge the expenses upon the frontagers.

Held, also, that the fact that slight temporary repairs had been previously done by the district board to the footway of the road by tar-painting it did not prevent them from exercising the powers given by the section.

The principle on which the expenses of paving a new street have been apportioned by a district board amongst the owners liable in respect thereof cannot be questioned in any Court.

Semble, by A. L. Smith and Rigby L.JJ., that the commissioners, trustees, and other authorities referred to by s. 112 of the Metropolis Management Amendment Act, 1862, are authorities having control of the

(1) W. N. (Dec. 8, 1894) 212; 71 L. T. 788. (2) [1894] 2 Q. B. 559.

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pavements or highways generally in the parish or place, and do not include turnpike trustees.

Wilson v. *St. Giles, Camberwell* ([1892] 1 Q. B. 1) and *Nesbitt* v. *Greenwich Board of Works* (L. R. 10 Q. B. 465) followed.

APPEAL from the judgment of a Divisional Court (Day and Wright JJ.) upon a case stated by a metropolitan police magistrate.

The facts so far as material were as follows.

The appellant was the owner of a house and premises fronting to a certain portion of a road called Charlton Road, within the district of the respondents. The respondents were the Board of Works for the Greenwich District.

The appellant was summoned by the respondents for non-payment of the sum of 33*l.* 6*s.* 6*d.*, being the amount alleged to be payable by her on May 19, 1894, pursuant to a resolution and order of the respondents' board, for defraying the estimated costs and expenses of paving the said portion of Charlton Road, the same being alleged to be a new street within the meaning of the Metropolis Management Act, 1862.

On August 3, 1892, the respondents passed a resolution to form and pave the said portion of Charlton Road; and on March 21, 1894, a resolution that the estimated costs and expenses of forming and paving the same, amounting to 1979*l.* 9*s.* 2*d.*, should be and were thereby apportioned amongst the owners of the houses forming and the land bounding and abutting on the said street. The amount apportioned to the appellant was the sum of 33*l.* 6*s.* 6*d.*

At the hearing of the summons before the magistrate the assistant clerk to the respondents was called, and produced the minute-books of the board, and also a document purporting to be an estimate of the cost of forming and paving the said portion of Charlton Road bearing the signature of the surveyor of the respondents, and he deposed that he was present at the meeting of the said board when the estimate was produced, that the surveyor was also present at the said meeting, and that he saw the surveyor sign the said estimate. The document was admitted in evidence by the magistrate, and was to the effect that the surveyor estimated the costs and expenses of paving the portion

of Charlton Road in question, including the costs of paving at the points of intersection of streets, and all incidental costs and expenses, at the sum of 1979*l.* 9*s.* 2*d.*

It was contended on behalf of the appellant before the magistrate that the production of this document was not sufficient evidence of the amount of the estimated expenses, and that the surveyor should be called to prove the estimate and the correctness of the apportionment. The magistrate overruled that contention, and the following facts were then proved or admitted before him.

At the date of the passing of the Act 3 Geo. 4, c. 126 (General Turnpike Act, 1822), Charlton Road was a turnpike road. By virtue of the said Act, 3 Geo. 4, c. 126, and the Act 7 Geo. 4, c. cxxv. (New Cross Turnpike Trust Act, 1826), Charlton Road was vested in the trustees of the New Cross Turnpike Roads, and was repairable by them. By the Act 27 & 28 Vict. c. 75, the said New Cross Turnpike Trust Act was continued in force until the 1st of November, 1865, and no longer.

From the year 1865 down to the issuing of the summons in the case whatever repairs were done to the roadway and footways of the portion of Charlton Road in question had been done by the respondents. Down to the year 1869 the road was bounded on the north and on the south by open fields separated from the road by a hedge and ditch. A plan was annexed to the case shewing the buildings now existing on each side of the road.

In the year 1869 five houses (Nos. 50 to 54 on the plan) were erected on the south side of the road, and shortly after the year 1870 thirteen other houses (Nos. 36 to 48 on the plan) were built, completing the eighteen houses called Eastcombe Villas. The remaining houses on the south side were built subsequently to the year 1880.

On the north side of the road, in the year 1869, there was only a house called "Eastcombe," with two lodges and outbuildings (Nos. 11, 12, and 13 on the plan). Since 1890 two detached blocks of small houses (Nos. 4 and 5, and Nos. 7, 8, 9, and 10 on the plan), containing two and four houses respectively, had been built on the north side and near to "Eastcombe." The remainder of the entire north side was bounded by vacant land.

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In the year 1883 a committee of the respondents recommended that the footway on the south side of the said road, from the Old Dover Road to the eastern end of Eastcombe Villas, should be made up and painted with tar, and a twelve-inch by six-inch Aberdeen granite kerb be fixed on edge at an estimated cost of 130*l.*; but that recommendation was referred back by the respondents to the said committee, who in lieu thereof recommended that the said footway should be painted with tar at an estimated cost of 3*l.* 10*s.*, which recommendation was adopted, and ordered to be carried into effect by the respondents in May, 1883. There was no evidence before the magistrate how this painting with tar was carried out, nor as to the formation of the path on the north side, which had been made up by tar paving an inch to an inch and a quarter thick for almost its entire length, and for a distance of fifty feet on the north side of the road by a brick path, and for some distance with a granite kerb; nor was there any evidence before him as to any repairs done by the respondents to the roadway or footways between 1865 and 1883, nor as to whether the footways had remained without further reparation from the year 1883 until the present time.

It was contended before the magistrate on behalf of the appellant that Charlton Road, being a turnpike road vested in turnpike trustees, was a street the maintenance of the paving and roadway whereof had previously to the passing of the Metropolis Management Amendment Act, 1862, been taken into charge and assumed by the authorities having control of the pavements and highways in the parish or place in which such street is situate, within s. 112 of the said Act. The magistrate overruled this contention on the ground, among others, that there was no evidence before him of any paving having been laid or maintained previously to the passing of the said Act. Upon the foregoing facts and evidence he found, as a fact, that the said portion of Charlton Road was in March, 1894, a "new street" within the meaning of the Metropolis Management Acts; that any repairs which had been carried out by the respondents were merely of a temporary character, and that the respondents were entitled to exercise their powers under the Metropolis Management Acts; and he made an order upon the

appellant for the payment of the said sum of 33*l.* 6*s.* 6*d.* and costs, as asked in the said summons.

The questions for the opinion of the Court were: (1.) Whether there was any evidence of a valid estimate and apportionment upon which the magistrate was entitled to act. (2.) Whether he was right in holding that the maintenance of the paving and roadway of the said street had not been taken into charge and assumed by the authorities within s. 112 of the Metropolis Management Amendment Act, 1862, previously to the passing of that Act. (3.) Whether he was right in holding that the said portion of Charlton Road was a "new street" in respect of which the respondents were entitled to exercise their powers under the Metropolis Management Acts, 1855 and 1862.

The Divisional Court gave judgment for the respondents. (1)

Crump, Q.C., and *A. Macmorran*, for the appellant. The street in question was not a "new street" within the meaning of the Metropolis Management Acts. By s. 250 of the Metropolis Management Act, 1855, the word "street" includes (inter alia) any highway (except the carriage-way of any turnpike road) and any road, lane, or footway, and a part of any such highway, road, lane, or footway. Sect. 244 of that Act provides that nothing in the Act shall divest the commissioners or trustees of any turnpike road of any powers or property vested in them save as therein expressly provided, and save that the footpaths of any such road shall be under the care and management of the vestries and district boards of the parishes in which the same are situate in like manner as other footpaths in such parishes and districts. So the footway was already a street in 1862, and the whole road was a street after November, 1865. It was not within the definition

(1) By s. 112 of the Metropolis Management Amendment Act, 1862, "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out"; and "the word 'pave' shall apply to and include the formation of the roadway or footway of any street."

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of a new street given by s. 112 of the Act of 1862, for it was not a street which was "formed or laid out" after the passing of that Act, and it was a street the maintenance of the paving and roadway whereof had been, previously to the Act of 1862, taken into charge and assumed by "trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place" in which such street was situate. The turnpike trustees had the charge of the roadway till 1865, and by s. 244 of the Metropolis Management Act, 1855, the charge of the footpath was thrown on the district board. Turnpike trustees are trustees within the meaning of s. 112 of the Act of 1862. The district board, having repaired the footway in 1883, cannot now treat this as a new street, and again exercise the power of paving it: *St. Giles, Camberwell* v. *Hunt.* (1)

The apportionment of the expenses among the owners was not made on a correct principle. The magistrate ought to have inquired as to how the apportionment had been made: *Reg.* v. *Marsham* (2); *Mile End* v. *Whitechapel Union.* (3)

Channell, Q.C., and *Edward Pollock*, for the respondents. The case does not really raise any question as to the apportionment. It was decided in *Nesbitt* v. *Greenwich Board of Works* (4) that there is no appeal with regard to the principle on which the apportionment is made by the district board among those who are liable. If the district board had charged some person whom they had no right to charge at all, or charged the wrong persons, the apportionment might be questioned, for they would be acting without jurisdiction. That was the case in *Mile End* v. *Whitechapel Union* (3); but no such point as that is raised by the magistrate in this case.

The question whether this was a new street is concluded by the decision in *St. Giles, Camberwell* v. *Crystal Palace Co.* (5), where it was held that the definition in s. 112 of the Act of 1862 is not exclusive of the ordinary meaning of the term "new street." This case is precisely similar to that with the exception that this had been a turnpike road. This road became a "new

(1) 56 L. J. (M.C.) 65.
(2) [1892] 1 Q. B. 371.
(3) 1 Q. B. D. 680.
(4) L. R. 10 Q. B. 465.
(5) [1892] 2 Q. B. 33.

street" in the ordinary sense of the term by the erection of houses after 1869. It was not a street in the ordinary sense of the term at that date. Moreover, this street comes within the terms of the second branch of the definition given by s. 112 of the Act of 1862; because the bodies there meant are bodies having the control of the pavements or highways in a parish or place generally, such as are referred to in 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), as commissioners, trustees, or other persons having the control of the pavements in any parochial or other district, not such bodies as the trustees of particular turnpike roads. The expressions used clearly mean the highway authority whatever it may be called in the particular parish or place. In the definition of "street" given by s. 250 of the Act of 1855, the roadway of turnpike roads is excepted, and therefore at the time when the Act of 1862 passed the whole of this road was not a street for the purposes of the Act.

The case of *Wilson* v. *St. Giles, Camberwell* (1), is conclusive to shew that the respondents have not by the slight temporary repair which they did to the footway in 1883 precluded themselves from treating this as a new street.

Crump, Q.C., in reply. In *St. Giles, Camberwell* v. *Crystal Palace Co.* (2) the vestry had not assumed the charge of the road. *Wilson* v. *St. Giles, Camberwell* (1), was wrongly decided, and this Court should overrule it.

LORD ESHER M.R. The main question is whether the magistrate was wrong in holding that the road in question was a new street within the meaning of the Metropolis Management Acts. It seems to me impossible to say that it was not a new street in the ordinary sense of the words. Down to the year 1869 the road was bounded by open fields, and it was clearly not a street then in the ordinary sense of the term. It may then have been a street for some of the purposes of the Acts. I care not whether that was so or not. The question is whether it is a "new street" for the purposes of the section now in question. Apart from the definition contained in s. 112 of the Metropolis Management Amendment Act, 1862, I think it would be clear

(1) [1892] 1 Q. B. 1. (2) [1892] 2 Q. B. 33.

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that this road did subsequently to 1869 become and was a "new street" in respect of which the authority was entitled to exercise the power of paving given to it by the Acts, and to charge the expenses on the frontagers. It has been held by this Court in *St. Giles, Camberwell* v. *Crystal Palace Co.* (1)—and, if it had not been so held, I should be prepared to hold it now—that, if a street is a new street in the ordinary sense of the term, independently of the definition in s. 112, it may be dealt with as such; and that the effect of the definition is to bring within the category of new streets things which would not in the ordinary sense of the term be called new streets, not to exclude things which come within the ordinary sense of the term. This road may for some of the purposes of the Act have been a street in 1869; but it did not become a street in the ordinary sense of the term until a sufficient number of houses had been built alongside of it to make it a street in that sense. The magistrate has found that it has now become a new street in the ordinary sense of the term by reason of the buildings which have since been erected. There was evidence on which he might reasonably so find, and we cannot overrule his finding to that effect. But it is argued that the district board have done something to this street which prevents their treating it as a new street and throwing the expenses of paving it on the frontagers. All they have done is to repair the footpath with tar to the extent of 3*l.* 10*s.* It is obvious that what they did was in the nature of slight temporary repair such as had been done in the case of *Wilson* v. *St. Giles, Camberwell.* (2) It was held in that case, and I think rightly held, that such repairs could not be taken into consideration, and did not prevent the vestry from exercising their powers with regard to a new street. The only remaining question is as to the apportionment. All that it is necessary to say with regard to that is that the question whether it was right or wrong is not a subject of appeal, and if the magistrate had raised any such question we should have had no jurisdiction to entertain it. I think our judgment must be for the respondents.

A. L. SMITH L.J. I am of the same opinion. The question with regard to the apportionment turns on s. 77 of the Metro-

(1) [1892] 2 Q. B. 33. (2) [1892] 1 Q. B. 1.

polis Management Amendment Act, 1862. It is not suggested that this apportionment involved any exercise of jurisdiction by the respondents in respect of a matter outside their jurisdiction. What it is sought to impugn is the proportion in which the various frontagers are charged. There is no appeal given as to this, and the magistrate had no power to entertain any question with regard to it. But as to the question whether this street was a new street within the meaning of the Metropolis Management Acts, I agree that the decision in *St. Giles, Camberwell* v. *Crystal Palace Co.* (1) is in point. The argument for the appellant is based upon the definition clause, s. 112 of the Metropolis Management Amendment Act, 1862; but it has been held by Lord Selborne L.C. in the House of Lords in *Robinson* v. *Local Board of Barton Eccles* (2) that such clauses as these are not meant to prevent words from receiving their ordinary popular sense, but to enable a term to be applied to something to which it would not in the ordinary use of language apply. The popular meaning of the words "new street" includes a case where a lane or road theretofore bounded by open fields is afterwards bounded by buildings, and it is found by the magistrate that down to 1869 (the Metropolis Management Amendment Act having been passed in 1862) this road was bounded on either side by open fields. It was clearly not a street then in the ordinary acceptation of the term. Since then it has become a street by reason of buildings erected on each side of it, and therefore has become a "new street." Whether we look to the second branch of the definition in s. 112 or not, this is a new street within the Act, and I agree with the counsel for the respondents that the "commissioners, trustees, surveyors, or other authorities" therein mentioned do not include trustees of a turnpike road, but only such authorities as are mentioned in Michael Angelo Taylor's Act. The judgment of the Divisional Court must be upheld.

RIGBY L.J. I am of the same opinion. I will deal first with the question as to whether this road was a new street within the meaning of the Metropolis Management Acts. It is not

(1) [1892] 2 Q. B. 33. (2) 8 App. Cas. 798.

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questioned that it is a street now in the ordinary sense of the term; and it is clear that in 1869 it was not a street in that sense. So in that sense it became a new street subsequently. Then, is it a new street in respect of which the power of paving and apportioning the expenses among the frontagers can be exercised? I think that it is. It was argued that the maintenance of the carriage-way having been taken in charge by the turnpike trustees, and that of the footpath by the local authority prior to the Act of 1862, it was not a new street within the Act. Assuming that the maintenance of it had been so taken in charge, there had not been a taking in charge by the local authority of the maintenance of the whole street. Assuming that turnpike trustees would come within the authorities mentioned in s. 112, which I do not think to be the case, the decision in *Wilson* v. *St. Giles, Camberwell* (1), seems to me to shew that s. 112 points to a case in which the maintenance of the street as a whole is taken in charge by the local authority, not to a case where the maintenance of part of the street is taken in charge by one set of persons, and that of the rest by another. I think the section contemplates a taking in charge of the maintenance of the paving and roadway of the street generally by such an authority as is mentioned in Michael Angelo Taylor's Act, namely, commissioners, trustees, or other persons having general control of the pavements in the streets in any parochial or other district. Therefore, I think the respondents had power to pave the street and apportion the expenses among the frontagers. If they have exercised the authority given to them by the Act and have made the apportionment to the best of their judgment among the owners of the houses and land fronting on the street, there is no appeal given against their exercise of that authority. The legislature has trusted to their judgment and discretion in the matter, and the bonâ fide exercise of that judgment and discretion is not the subject of an appeal.

Appeal dismissed.

Solicitors for appellant: *Saw & Son.*

Solicitors for respondents: *Watson, Sons & Room, for Spencer, Greenwich.*

(1) [1892] 1 Q. B. 1.

E. L.

PLETTS *v.* CAMPBELL.

1895
June 11.

Licensing Acts—Offences—Sale at Place not authorized by Licence—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

A brewer, having an off-licence for the sale of beer by retail, was in the habit of sending round his cart containing jars of beer to houses in the neighbourhood; the jars of beer were delivered from the cart at the customers' houses in pursuance of orders given by the customers at their houses to the carter in the previous week, the price being paid by the customer to the carter in the week succeeding delivery. There was no label or mark upon the jars to shew that any particular jar had been appropriated to any particular customer:—

Held, that the sale of the beer must be taken to have been at the house of the customer and not at the licensed premises, and that the brewer was properly convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquor at a place where he was not authorized by his licence to sell the same.

Case stated by the Lancashire Quarter Sessions upon an appeal against a conviction by the justices of Blackburn, whereby the appellant was convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquor at a house No. 142, High Street, Rishton, where he was not then authorized by his licence to sell the same, he then being duly licensed to sell intoxicating liquors by retail in his house and premises, No. 11, Stanley Street, Burnley. The Court of Quarter Sessions allowed the appeal subject to this case.

The appellant, a brewer, held a licence, pursuant to 11 Geo. 4, and 1 Wm. 4, c. 64, and the Acts amending the same, for the sale of beer by retail at 11, Stanley Street, Burnley, such beer to be consumed off the premises. On May 26, 1894, one Greenwood, a person in the appellant's employ, delivered from a cart driven by him a stone jar containing one gallon of beer to the wife of one Moore at 142, High Street, Rishton, in payment for which he was to, and did, receive one shilling on the appellant's behalf on June 2, 1894. The evidence shewed a course of dealing for about eight months prior to May 26, whereby Greenwood delivered from the appellant's cart, carriage free, one gallon of beer week by week to Moore or his wife, in pursuance of orders given to him by them the previous week, and on the

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occasion of each delivery received payment of one shilling for the gallon of beer delivered the preceding week, together with the empty jar. An order was given by Mrs. Moore to Greenwood in the week preceding May 26 to bring a gallon of beer on that day, and was (with others) entered by Greenwood when received in an order-book kept by him for the purpose of being submitted to the appellant. On his return to Burnley he made out a list of orders so received, and presented it to the appellant, who examined it, passed the orders, and directed them to be executed. On May 26 Greenwood selected from the appellant's stores at Stanley Street the goods necessary to execute the orders aforesaid and no more. The jar delivered to Mrs. Moore was not distinguished by any label or mark from similar jars, the goods being placed in the cart in the order at which it would arrive at the customers' houses; Mrs. Moore being the last customer to be supplied, her jar was placed last on the cart. There was no evidence that either the appellant or Greenwood communicated to Moore or his wife the acceptance of the order for the gallon of beer for delivery on May 26, otherwise than by the actual delivery of the beer to Mrs. Moore on that date.

It was contended for the appellant that the sale of the said gallon of beer delivered on May 26 to Mrs. Moore took place at the appellant's premises at 11, Stanley Street, Burnley; for the respondent that the sale of the beer, or a transaction in the nature of a sale, took place at Moore's house at 142, High Street, Rishton.

The Court of Quarter Sessions were of opinion that the sale of the beer took place on the appellant's licensed premises, and that the delivery thereof to Moore at Rishton was not an offence within the meaning of s. 3 of the Licensing Act, 1872, and quashed the conviction subject to the opinion of the High Court. If the Court were of opinion that they were right in so finding, the order quashing the conviction was to be affirmed; if not, the conviction was to stand.

Bigham, Q.C. (*Ferguson* with him), for the respondent. (1)

(1) The terms "appellant" and "respondent" are used throughout this report with reference to the positions of the parties on the appeal to quarter sessions, and not to their position in the Divisional Court.

The sale of the beer did not take place at the appellant's licensed premises, but at the customer's house, where it was in fact ordered, delivered, and paid for. The property in the beer did not pass until delivery and payment. There was no appropriation of any particular jar to any particular customer, and if a jar had been broken in transit the appellant, and not the customer, must have borne the loss. Refusal by the customer to accept a jar might have afforded ground for an action to recover damages, but not for an action to recover the price: there was a mere executory contract to purchase, which was completed by delivery and payment.

Poland, Q.C. (*W. Mackenzie* with him), for the appellant. Admitting that the property in the beer did not pass till delivery, the passing of the property is not the proper test to be applied in questions arising under this section. The case is very similar to *Stretch* v. *White* (1), where Blackburn J. said it was not necessary to constitute a sale, under s. 13 of the Markets and Fairs Clauses Act, 1847, that there should be a transmutation of property. Enough was done upon the licensed premises to amount to a sale of the beer on those premises.

Bigham, Q.C., in reply.

WILLS J. I am of opinion that the decision of quarter sessions was erroneous, and that the original conviction was correct. But for the case of *Stretch* v. *White* (1), which was decided upon another statute, I should have thought the present case too clear for argument. The facts are simple. A licensed person sends his carter to take orders at a distance, which is precisely the same thing in law as if he went himself and took the orders; he selects on his licensed premises the goods, in this case a jar of beer, which he thinks will answer the purpose; he hands the jar with others for other persons to the carter and sends him to the premises of a customer, where a jar is delivered and where it is subsequently paid for. There is no evidence of any transaction at the licensed place except the mere fact that the goods were stored there and despatched from there: everything else took place at the customer's house. It has been argued that a

(1) 25 J. P. 485.

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sale involves a transmutation of property, and that it is not complete until the property passes. I agree that a sale cannot be completed without a transfer of property; but, without going into niceties of that kind, which are possibly out of place with reference to this enactment, it is plain that it was at the customer's house that the material elements of the transaction took place. It cannot be material whether the jars, which when sent out were not appropriated to the different customers, were kept upon the licensed premises, or whether the circumstances which are relied upon as a selection of the goods took place in the cart or at the licensed place; most certainly what took place at the latter did not amount to a complete appropriation with the assent of the respective purchasers of the jars, which was made either at the customer's house or in the cart. It cannot be said that the sale was effected on the licensed premises.

We have been pressed with the case of *Stretch* v. *White* (1), as to which I might say that if it decides what is suggested it is hardly possible that it should not have found its way into the regular reports; the report, too, is unsatisfactory, introducing as it does a quantity of conversational matter between the bench and the bar without any detailed judgment at the end. As to that decision, there seems to have been very good evidence that the sale was complete by transmutation of the property when the whole of the butter was manufactured and set aside for delivery; and if that is so the case does not stand in our way. Acts of Parliament of the nature of the Licensing Acts invariably contain provisions as to the matters to which they relate which are very special in their nature, and it is very often fallacious to apply decisions under one statute to cases arising under another. I cannot think that this particular decision is applicable, or that we are bound to follow it. Upon the plain words of the present statute I cannot persuade myself to entertain a doubt.

WRIGHT J. I am of the same opinion. I think it is going too far to say that the word "sell" must necessarily mean a sale in the legal sense: it may be satisfied by an agreement to sell, of which *Stretch* v. *White* (1) is an illustration. Nor do I wish to

(1) 25 J. P. 485.

say that a slight change in the circumstances might not make the whole difference in the legality of the appellant's practice; I do not say that if the jars were addressed or otherwise appropriated to the customer before leaving the licensed premises it would necessarily make a difference in the licence-holder's liability, but it would be a very different case to the present. I concur with the judgment of my brother Wills, that in an agreement of bargain and sale, or of sale and delivery, there is no sale so long as it is uncertain to what articles the contract applies; here there is nothing till the arrival of the cart at the customer's door and the selection there of one out of several jars to shew a sale of one jar more than of another.

Order of quarter sessions reversed.
Conviction restored.

Solicitors for appellant: *H. Clifford Gosnell & Tiernay, for Garnett & Jackson, Burnley.*

Solicitors for respondent: *Ainsworth, Sanderson & Howson, Blackburn.*

W. J. B.

LAMBTON *v.* KERR.

1895
May 23.

Revenue—House Duty — Dwelling-house — Exemption — Training Stables — 48 Geo. 3, c. 55, Sched. B, r. 2—Inhabited House Duty Act, 1851 (14 & 15 Vict. c. 36)—Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13, sub-s. 1.

A trainer of race-horses occupied stables which he used for the accommodation of horses trained by him; in one wing of the stables were four rooms in which some of the stable-lads employed by him slept. Close to the stables, but outside the stable-yard, was a ten-roomed house with domestic offices and garden, which was occupied by the trainer's "head lad." The stables were included with the dwelling-house in an assessment to the inhabited house duty:—

Held, that the stables belonged to and were occupied with a dwelling-house within the meaning of 48 Geo. 3, c. 55, Sched. B, r. 2; that they did not come within the exemption in 41 & 42 Vict. c. 15, s. 13, sub-s. 1, in favour of premises occupied solely for the purposes of a trade or business; and that the assessment was therefore right.

CASE stated by Commissioners of Income Tax under 43 & 44 Vict. c. 19, s. 59.

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The appellant, a trainer of race-horses, appealed against an assessment in respect of inhabited house duty upon 365*l.*, the annual value of premises occupied by him in the parish of Newmarket All Saints. The premises charged consisted of:—

(1.) A dwelling-house called "Park Lodge," occupied by a servant of the appellant occupying the position of "head lad." The house contained ten rooms, and, with the domestic offices and garden, was of the probable annual value of 100*l.*

(2.) Domestic offices and garden (about one rood) attached to the dwelling-house.

(3.) About half-an-acre of ground on the east side of the dwelling-house, which was used entirely as a training and exercising-yard, and which communicated with the dwelling-house by two gateways.

(4.) Stables and saddle-rooms in three ranges on the north, south, and east of the aforesaid yard respectively, capable of providing accommodation for about thirty-nine horses. Over the stables and saddle-rooms on the east side of the yard there were four rooms, in which sleeping accommodation was provided for stable-lads employed by the appellant.

The appellant maintained that the stables, saddle-rooms, and training-yard, which were used by him for the purposes of his business as a trainer of horses belonging to other persons, were not assessable to inhabited house duty notwithstanding the fact that over a part of one range of the stables and saddle-rooms there were rooms in which sleeping accommodation was provided for stable-lads. He further maintained that it was the invariable practice of the Inland Revenue to exempt livery-stables even when stablemen slept over one or more of such stables, and also to exempt stables and other outbuildings and yards contiguous to farmhouses in cases where such stables, outbuildings, and yards were used by the farmer for the purpose of carrying on his farming business, and not for his personal enjoyment, even if one or more farm servants or labourers had sleeping accommodation over a portion of such stables or other outbuildings; that the premises of the appellant resembled those of livery-stable keepers and farmers, and that it was not the intention of the legislature in imposing the duty to include such premises as those described in para-

graphs 3 and 4. He also contended that if it was considered that the fact of there being sleeping-rooms for stable-lads over one range of the stables and saddle-rooms converted a portion of such stables and saddle-rooms or of such range into a dwelling-house, the liability to inhabited house duty assessment should be restricted to the annual value of such portion or such range, and that this fact did not necessarily render the whole of the stables, saddle-rooms, and exercising-yard liable to duty.

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In support of the assessment it was contended :—

(1.) That the stables, saddle-rooms, and training-yard belonged to and were occupied with the dwelling-house within the meaning of 48 Geo. 3, c. 55, Sched. B, r. 2.

(2.) That livery-stables occupied with a dwelling-house and slept in would not be held to be exempt by the Inland Revenue.

(3.) That as part of the stables and saddle-rooms were used for the purpose of providing sleeping accommodation for stable-lads, no portion of the premises fell under the exemption in favour of business premises provided by 41 & 42 Vict. c. 15, s. 13, sub-s. 1.

The Commissioners were of opinion that the premises were correctly charged to inhabited house duty, and confirmed the assessment, but stated this case.

Finlay, Q.C., and *Scott Fox*, for the appellant. The stables do not come within the provisions of 48 Geo. 3, c. 55, Sched. B., r. 2, or of 14 & 15 Vict. c. 36, which incorporates that schedule. Under that rule the dwelling-house must be the main subject of occupation, and stables only fall within it when they are accessory or subsidiary to the dwelling-house. Here the stables are the main subject of occupation, and are not "occupied with" Park Lodge within the meaning of the rule. In *Young* v. *Douglas* (1) stables belonging to a hotel and occupied in connection with it were held to be properly included in the assessment; but that was on the ground that the hotel was itself a dwelling-house, and that the occupation of the stables was merely incidental to the occupation and enjoyment of the dwelling-house. If properly looked at, that case is in the appellant's

(1) 1 Tax Cas. 227; 7 Court Sess. Cas. 4th Series, 229.

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favour. In *Cheape* v. *Kinmont* (1) stables, kennels, and cottages belonging to a hunt committee were all treated together for the purpose of assessment, and it was held that the stables and kennels were properly included. The proper principle is, however, not so to treat them, but to consider whether the stables "belong to and are occupied with" the dwelling-house in the sense of being accessory to it.

Secondly, if the stables fall within the taxing statute they also come within the exemption in 41 & 42 Vict. c. 15, s. 13, sub-s. 1, of premises occupied solely for the purposes of trade or business. The facts shew that the stables are really used for the purpose of carrying on the business of a trainer of race-horses, and it makes no difference that for purposes of convenience the stable-lads sleep in one of the blocks. [They also cited *Smith* v. *Petrie*. (2)]

Danckwerts (*Sir R. T. Reid*, *A.-G.*, and *Sir F. Lockwood*, *S.-G.*, with him), for the respondent. The correct principle of assessment is to look at these premises as a whole. It is clear from the schedule to 14 & 15 Vict. c. 36, which is the taxing enactment, that the Act was intended to include dwelling-houses used partly for trade purposes and partly for residence. If the appellant's contention is correct, s. 3 of that Act, which exempts market gardens and nursery grounds, is unnecessary; the section, however, proceeds upon the assumption that nursery grounds occupied with a dwelling-house were primâ facie assessable to inhabited house duty. The stables in the present case were themselves occupied as a dwelling-house by the stable-lads, and do not come within the exemption in favour of premises used solely for business purposes. The stable-lads were not there as mere caretakers, and in any event there cannot be more than one caretaker: *Weguelin* v. *Wayall*. (3) [He also cited *Russell's Case* (4); *Banks* v. *Glasgow and South Western Ry. Co.* (5)]

Finlay, *Q.C.*, in reply.

(1) 2 Tax Cas. 418; 16 Court Sess. Cas. 4th Series, 144.
(2) 3 Tax Cas. 155; 19 Court Sess. Cas. 4th Series, 405.
(3) 14 Q. B. D. 838.
(4) 1 Tax Cas. 135; 4 Court Sess. Cas. 4th Series, 1143.
(5) 1 Tax Cas. 325.

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GRANTHAM J. I am of opinion that our judgment should be for the respondent. The case was argued by the appellant's counsel, and up to a certain point by the respondent's, as if the whole question turned upon whether or not the stables were accessory or subsidiary to Park Lodge, and it appeared to be assumed that it was necessary to shew that they were only an accessory, because Park Lodge was liable to be assessed as a dwelling-house, and therefore the stables would come under rule 2 of the schedule to 48 Geo. 3, c. 55. In my judgment, however, that is not the proper way of treating the case. We have to look at the whole premises together, and not first of all at the house independent of the stables: we must see what the stables are, and what is the position occupied by the house. We find that the stables are not only stables, but that they contain rooms which are practically a dwelling-house for men who belong to the stables and who work in them. Therefore, besides the stables, we have these four rooms in the stables, and we have a separate dwelling-house which is practically attached to the stables. Looking, therefore, at the building as a whole, I am clearly of opinion that the case comes within the decision in the Scotch case of *Cheape* v. *Kinmont* (1), where it was held that in the case of hunt kennels and the dwellings of hunt servants they must all be looked at together as one set of buildings, although there was no communication between the dwellings used by the hunt servants and the buildings occupied by the hounds and the other buildings occupied for the purposes of the hunt. In this case I think that, taking all these buildings together, they must be treated as a dwelling-house with these stables, and that as the object of the legislature was to tax dwelling-houses, the whole would be liable to be taxed unless the stables could be brought within the exemption. At first I was inclined to think that they might be brought within the exemption until I looked more closely at the section which gives it, when it appears to be clear that the exemption only applies to premises used for the purpose of a trade or business carried on for profit, and in cases where no one lives upon the premises except a caretaker. Here some one does live upon these premises other than a caretaker,

(1) 2 Tax Cas. 418; 16 Court Sess. Cas. 4th Series, 144.

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because the persons who live upon the premises live there for the purposes of trade, and not merely for the purpose of looking after the premises; they live there for the purpose of these training-stables. Under those circumstances I think that *Cheape* v. *Kinmont* (1) is an authority, if one were necessary in the present case; but in my judgment, for the reasons I have given, under any circumstances we should be obliged to confirm the assessment.

CHARLES J. I am of the same opinion. The first question we have to determine is whether the case comes within the enactment in 48 Geo. 3, c. 55; whether the provision imposing taxation strikes this case. It is said that it does not, because these stables, having regard to the facts found in the case, cannot be held to belong to, and be occupied with, any dwelling-house. No doubt the statute does make it necessary, in order to render a stable a proper subject-matter of assessment, that that stable should be one belonging to and occupied with a dwelling-house. I was struck at first with the way in which the appellant's case was presented to us, and with the argument that that means a case where the dwelling-house is the principal thing and the stable is strictly accessory to it; but upon more careful consideration of the language of the statute, it does not seem to me to require such a limited construction. All that we have to ask ourselves in order to apply the section is, first, whether there was a dwelling-house to begin with. In this case there assuredly was a dwelling-house—namely, the dwelling-house where the head lad lived; that is sufficient to answer the first question. I think also that there was another dwelling-house situate in the eastern block of the stables themselves; but quite apart from that, there was undoubtedly a dwelling-house, which is stated to be of the annual value of 100*l*.

Next comes the question whether these stables can be truly said to belong to it, and to be occupied with the dwelling-house. In order to answer this question we must look at the whole of the statements in the case; and it is there found that these stables and this dwelling-house were undoubtedly being used by

(1) 2 Tax Cas. 418; 16 Court Sess. Cas. 4th Series, 144.

five persons, servants of the occupier, four of whom occupied one part, and one occupied the other part. They were being used by those persons, not as mere caretakers, but for a common purpose —namely, the purpose of training horses. Therefore, whilst on the one hand the stables may be said to belong to the dwelling-house, on the other hand the dwelling-house equally belongs to the stables: they each belong to the other, and are both used for a common purpose. That is the conclusion at which I should arrive, apart from authority. There is, however, a case which is very like the present case, that of *Cheape* v. *Kinmont* (1), where the Court of Session held that the whole of the premises occupied by the huntsman, the whip, and the grooms of some hunt kennels must be looked at in order to find whether they were above or below the lowest amount chargeable in Scotland with house duty. In his judgment the Lord President said that there was a dwelling-house occupied by the huntsman (just as in the present case), that the premises were occupied for one common purpose, and therefore they fell within the schedule to the old Act and within the schedule to the new Act; and Lord Shand says that they must be regarded as one subject for the purpose of assessment. Therefore, it seems to me that the taxing provisions do apply in the present case.

Then can any reliance be placed upon the exemption in 41 & 42 Vict. c. 15? It is only necessary to read carefully the terms of the exemption to see that it is inapplicable, because it only applies to houses occupied solely for the purpose of trade or business; and the last clause, which provides that this exemption shall take effect although a servant or other person dwells in the house for the protection thereof, seems to exclude the case where the premises are occupied not only for business, but also for the actual dwelling of persons who are not mere caretakers, but who are the servants of the occupier.

Judgment for the respondent.

Solicitors for appellant: *Ruston, Clark & Ruston, for Ruston, Newmarket.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) 2 Tax Cas. 418; 16 Court Sess. Cas. 4th Series, 144.

W. J. B.

1895
May 24.

BROWN, SHIPLEY & CO. *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Marketable Security—Promissory Note—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 33; *s.* 82, *sub-s.* 1 (*b*); *s.* 122.

An American railway company, as security for a temporary loan, handed through their agents in England to the lender an instrument which stated that for value received they promised to pay twelve months after date to the order of themselves the amount named in it. It also contained a statement that it was one of a series, and was secured by a deposit of gold bonds which (or a sufficient amount of their proceeds) were to be held in trust for the benefit of the holders of the instruments. The instruments were dealt in upon the London Stock Exchange, but were not officially quoted there:—

Held, that the instrument was not a marketable security within the meaning of s. 82, sub-s. 1 (*b*), of the Stamp Act, 1891, but was a promissory note, and was only chargeable with stamp duty as a foreign bill of exchange.

Case stated by the Commissioners of Inland Revenue under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

The instrument chargeable with the duty was issued by the Baltimore and Ohio Railroad Company in America; it purported to be one of a series, and had been purchased on the London Stock Exchange; it bore upon it the certificate of the appellants, who are merchants in the City of London. The following is a copy of the instrument:—

"Two thousand pounds sterling.

"Number 101. Baltimore Md. 18th October, 1893.

"For value received we promise to pay Twelve months after date to the order of ourselves two thousand pounds sterling (2000*l.*) payable with interest at the rate of Five per cent. (5%) per annum at the office of Messrs. Brown Shipley & Company London, England. This note is one of a series of notes amounting to Four hundred and fifty thousand pounds sterling which is secured by the deposit of First Mortgage Gold Bonds (principal and interest of which are guaranteed by the Baltimore and Ohio

Railroad Company) which bonds or a sufficient amount of the proceeds of them if sold before the maturity hereof are to be held in trust under an agreement dated 7th October 1893 made between said Railway Company and Brown Shipley & Company for the benefit of the holders hereof.

"The Baltimore & Ohio Railroad Company

"By Charles F. Mayer President."

Across the face of the instrument a certificate was printed in red ink as follows:—

"We hereby certify that this note is one of the series therein mentioned and is secured by the deposit of the securities described in the agreement therein referred to.

"Brown Shipley & Co."

When presented to the Commissioners the instrument had upon it a duly cancelled foreign bill stamp of the value of 1*l.*

The instrument and also the other instruments of the series were handed by the appellants in the United Kingdom to various persons who lent to the company the amounts mentioned in the said instruments, and were so handed to them as and for the security for the moneys so lent and as a document of title in respect thereof. Instruments of the series had been from time to time dealt in on the London Stock Exchange; but such instruments had never been quoted officially or otherwise on the London Stock Exchange. All the instruments were duly paid by the appellants at maturity.

The appellants claimed that the instrument was chargeable with stamp duty as a foreign bill of exchange or promissory note.

The Commissioners were of opinion that the instrument was a marketable security as described by s. 82, sub-s. 1 (*b*) (1) of the Stamp Act, 1891, and that as it was transferable by delivery and was not a colonial government security and bore date after

(1) By 54 & 55 Vict. c. 39, s. 82, sub-s. 1 (*b*), marketable securities for the purpose of the charge of duty thereon include a marketable security made or issued by a foreign company, which, though originally issued out of the United Kingdom, is, after August 6, 1885, delivered to a subscriber in the United Kingdom.

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BROWN, SHIPLEY & Co. v. COMMISSIONERS OF INLAND REVENUE.

August 6, 1885, it was chargeable under the head "Marketable Security," sub-head (3) in the 1st schedule to the Act, with the duty of 10*l.*, being the ad valorem duty of one shilling for every 10*l.* of the sum of 2000*l.* thereby secured, and they assessed the duty thereon accordingly.

The questions for the opinion of the Court were—

1. Whether the instrument was chargeable with the duty of 10*l.* in accordance with the assessment of the Commissioners.

2. If not, with what duty it was chargeable.

A. M. Bremner (*Finlay, Q.C.*, with him), for the appellants. The instrument was sufficiently stamped as a promissory note; being a promise to pay to the order of the makers, it became a promissory note upon indorsement. (1) It comes within the definition of a promissory note in s. 33 of the Stamp Act, 1891, as a "document or writing (except a bank note) containing a promise to pay any sum of money," and could be sued upon as a promissory note. It is in no sense a security; it gives no charge upon the property of the company, but is merely an unqualified promise to pay.

[He was stopped by the Court.]

Danckwerts (*Sir R. T. Reid, A.-G.*, and *Sir F. Lockwood, S.-G.*, with him), for the respondents. The instrument is a marketable security, it being part of a scheme for raising money upon certain security mentioned in the instrument itself; it is clearly a contract with the lender that a trust deed exists, and that bonds have been deposited as a security for the loan. It is in effect a debenture, though not so called, and is clearly a marketable security in fact, if not within the meaning of the statute, for the instruments are dealt in on the Stock Exchange. It is within the definition in s. 122 of a marketable security as "a security of such a description as to be capable of being sold in any stock market in the United Kingdom." It is not a promissory note, for a promissory note must contain a promise to pay money and nothing more. [He cited *Texas Land and Cattle*

(1) It was stated by the appellants' counsel that, although the case was silent as to the indorsement of the instruments, they had all in fact been indorsed.

Co. v. *Commissioners of Inland Revenue* (1); *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (2); *Scottish Mortgage Investment Co. of New Mexico* v. *Commissioners of Inland Revenue* (3); *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (4); *Rothschild & Sons* v. *Commissioners of Inland Revenue* (5); *Yeo* v. *Dawe* (6); *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue.* (7)]

Bremner, in reply. In the *Texas Land Company's Case* (1) the instrument was a transfer of a debenture, and in the *British India Steam Navigation Company's Case* (4) it was upon its face three times called a debenture: those cases are therefore distinguishable: the other cases are not in point. It is not enough that the instrument is marketable: it must be a marketable "security"; and this document is not a security at all.

GRANTHAM J. I am of opinion that our judgment should be for the appellants. The document is, I think, properly stamped as a promissory note, and need not bear the stamp imposed upon a marketable security. No doubt there has been a long course of practice, I will not say of decisions, on the part of the commissioners, shewing that they have always claimed the right to insist on having a document stamped under the highest scale of duty that it can bear, and if a document may be regarded in either of two lights, for instance, as a debenture as well as a promissory note, I think they could insist on its being stamped as a debenture. In the present case, however, I think the document cannot be regarded as what is called a marketable security transferable on the Stock Exchange, so as to bear the higher duty; it is rather a promissory note.

None of the cases cited in argument is exactly in point as an authority; the nearest is that of *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (4), where the Court said that it was difficult to say what the document really was, but that as it called itself a debenture it must be treated as one for

(1) 16 Court Sess. Cas. 4th Series, 69; 26 Sc. L. R. 49.
(2) L. R. 7 Ex. 211.
(3) 2 Tax Cas. 165; 14 Court Sess. Cas. 4th Series, 98.
(4) 7 Q. B. D. 165.
(5) [1894] 2 Q. B. 142.
(6) 53 L. T. 125.
(7) 21 Q. B. D. 352.

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Grantham J.

revenue purposes. Lindley J. there discusses the question of what is a debenture; and the result of his description and the description given of it in other cases is, that it may come under one or other of three categories: either a promise to pay money under seal, or an undertaking to pay it out of the assets of the company, or an undertaking to pay out of the assets of the company with a promise that no charge shall be created ranking prior to the debenture which has been issued. In each of those cases the document which is called a debenture is the security for the money advanced, and is the evidence of title by which the holder is enabled to go upon the assets of the company at large. Does this document enable the holder to do so? Certainly not. It merely says that the company will pay a certain sum of money; while in order to shew the holder that they can really pay it, he is told that by another and entirely different document, a trust deed, they had handed over to trustees certain gold bonds, and that if any of those are sold before the instrument becomes due the amount for which they have been sold, to the value of that instrument at any rate, is to be either paid to the holder or to be retained by the trustees. Under those circumstances this document is not the security which has secured the money, and the persons who purchase it on the Stock Exchange purchase it on the faith of the statement of this company that they will pay the 2000*l.* at the due date; they believe that the company have something behind them which will enable them to pay the money. In the case to which I have already referred Grove J. suggested that the company might easily avoid the difficulty in future by omitting the word "debenture." In the present case the appellants have avoided the difficulty: they do not call the instrument a debenture, but have drawn it as a promissory note. I think, therefore, for the reasons I have given, that this appeal must be allowed.

CHARLES J. I am of the same opinion. I think that this document is a promissory note, and that any contractual rights which it gives to the holder it gives by virtue of being a promissory note, and nothing more. It is alleged that it is a marketable security; but, except perhaps in so far as a promis-

sory note may be described by the word "security," it is not in my opinion a security at all, and not a marketable security within the meaning of s. 82 or s. 122 of the Stamp Act, 1891. If I had been able to come to the conclusion that the latter part of this document did constitute some contractual relation between the holder of the note and the railway company, different considerations might have been applicable; to my mind, however, the latter part is nothing more than a notice to the holders of this promissory note that it has been secured in the manner therein specified, and does not constitute any additional promise on the part of the makers.

Reference has been made in argument to various cases; but I do not think that any of them is decisive of this case in favour of the Commissioners. Among them was the case of *Texas Land and Cattle Co.* v. *Commissioners of Inland Revenue* (1), in which case the document was a transfer of a debenture. A debenture, although I do not know that it has ever been legally defined, has been held to include three classes of security: acknowledgment of debt under seal, acknowledgment of debt under seal coupled with a charge upon the property of the company which gives the acknowledgment (which is the common form of debenture), and, lastly, an acknowledgment of debt under seal coupled with a charge upon the property of the company in favour of the person to whom the acknowledgment is given, and a further restriction preventing the company from creating a prior charge. Those are the three well-known classes of debentures, which are particularly mentioned by Bowen L.J. in his judgment in *English and Scottish Mercantile Investment Co.* v. *Brunton.* (2) The document in the present case does nothing in the way of giving a charge on the property of the makers, and is, in my judgment, in no sense a debenture, or capable of being properly described as one; the case of *Texas Land and Cattle Co.* v. *Commissioners of Inland Revenue* (1) has, therefore, no application, for there the document was the transfer of a debenture, something which did create or transfer a charge on the property of the company. With regard to the case of *British India Steam*

(1) 16 Court Sess. Cas. 4th Series, 69; 26 Sc. L. R. 49.
(2) [1892] 2 Q. B. 700.

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Charles J.

Navigation Co. v. *Commissioners of Inland Revenue* (1), upon which so much reliance was placed, when the judgments are carefully examined it is plain that the decision proceeded upon the assumption that in point of fact, although not under seal, the document, which had been called a debenture by the parties, ought to be considered as a debenture given by the one party to the other. Moreover, by the very terms of the document in that case, an advantage was conferred upon the holder—namely, that by presentation of the coupons attached to it he was enabled, upon a particular day, to obtain payment of the money mentioned in the coupon. I do not think, therefore, that that case can be relied on as an authority for our holding that this document is a marketable security.

I have not overlooked the statement in the second paragraph of the special case—that such documents are dealt in on the Stock Exchange; but that is by no means decisive of the case, when one has once come to the conclusion, as I have done, that this document is a promissory note and not a debenture.

Judgment for the appellants.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) 7 Q. B. D. 165.

W. J. B.

THE QUEEN *v.* SLADE AND OTHERS. *Ex parte* SAUNDERS.

1895 *June* 26.

Justices—Practice—Conviction—Closing Order—Limitation of Time—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 5, *sub-s.* 9.

The limitation of six months, within which complaint must be made, imposed by s. 11 of the Summary Jurisdiction Act, 1848, applies to proceedings for acting contrary to a closing order, in breach of s. 5, sub-s. 9, of the Public Health (London) Act, 1891, and therefore a conviction for such an offence, which imposes a fine in respect of every day during a period exceeding six calendar months, is bad.

ARGUMENT of an order nisi calling upon a metropolitan police magistrate, and the prosecutors, the Southwark District Board of Works, to shew cause why a certiorari should not issue to bring up and quash the conviction of the defendant. The prosecutors had served a notice on the defendant calling upon him to abate a nuisance existing on certain premises, No. 75, Blackfriars Road. The defendant, not having complied with the notice, was summoned, and fined, and a closing order was made. Afterwards the defendant, not having complied with the closing order, was summoned at the police court for knowingly and wilfully acting contrary to such order, in breach of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5, sub-s. 9. (1) The defendant was convicted, and the magistrate imposed a fine of 9*l.* 13*s.*, being one shilling a day, in respect of a period of 193 days from February 1 to August 12, 1894, inclusive, during which period the defendant had acted contrary to the closing order.

The order nisi was applied for and granted, on the ground that the conviction was invalid, because by reason of the limitation of time prescribed by s. 11 of the Summary Jurisdiction

(1) By 54 & 55 Vict. c. 76, s. 5, sub-s. 9, "If a person knowingly and wilfully acts contrary to a prohibition or closing order he shall be liable to a fine not exceeding 40*s.* a day during such contrary action."

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THE QUEEN v. SLADE. *Ex parte* SAUNDERS.

Act, 1848 (11 & 12 Vict. c. 43) (1), the defendant could not be liable to a fine in respect of a period exceeding six calendar months.

F. Dodd, for the magistrate and the board of works, shewed cause. The conviction is not necessarily invalid, for the penalty imposed is greatly below the maximum penalty allowed by the statute. It is a single penalty imposed in respect of a continuing offence: *Reg.* v. *Catholic Life and Fire Assurance and Annuity Institution* (2); *London County Council* v. *Worley*. (3)

If this is not the correct view, then the conviction may be amended under the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 7, by remitting so much of the penalty as is imposed in respect of a period more than six months before the date of the conviction, the effect of which would be to reduce the penalty from 9*l.* 13*s.* to 9*l.* 2*s.*: *Reg.* v. *Walker*. (4)

The defendant appeared in person to support the order, but was not called upon.

WILLS J. I have come to the conclusion that this conviction is clearly wrong. Mr. Saunders was treated as being summoned, and was convicted, for an offence extending over a period of time which comprehends eleven days in respect of which proceedings are barred by the limitation contained in s. 11 of the Summary Jurisdiction Act, 1848. We cannot take the conviction to pieces, so as to reduce the penalty by the amount imposed in respect of those eleven days, and uphold the remainder of the order. In the present case the magistrate has made no mistake which can be the subject of an amendment such as we have been invited to make. Mr. Saunders was convicted in respect of the whole period of 193 days, and the penalty was

(1) By 11 & 12 Vict. c. 43, s. 11, "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

(2) 48 L. T. (N.S.) 675.

(3) [1894] 2 Q. B. 826.

(4) 45 J. P. 682.

imposed in respect of the whole of that period. The motion for a certiorari was made and granted on this ground only, and the conviction must be quashed.

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WRIGHT J. concurred.

Conviction quashed.

Solicitor for the prosecution: *R. J. Tickle.*

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GREATOREX *v.* SHACKLE.

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County Court—Jurisdiction—Interpleader—Action for Commission—Claims by different Parties.

The plaintiffs, auctioneers, sued the defendant for 35*l.* 12*s.*, agreed commission, in respect of the sale of a house. A second firm of auctioneers claimed 25*l.* from the defendant for commission in respect of the same sale of the same house:—

Held, that the defendant was not entitled to relief by way of interpleader.

APPEALS by the plaintiffs, Messrs. Greatorex & Co., and by Messrs. Walton & Lee, from the order of the judge of the Marylebone County Court directing a new trial in the action of *Greatorex* v. *Shackle*, which had been tried in that court.

The plaintiffs Greatorex & Co., who were auctioneers, brought an action against the defendant, Mrs. Shackle, to recover the sum of 35*l.* 12*s.* as the agreed amount of commission payable to them in respect of the sale of a house in Inverness Terrace. It appeared that Messrs. Walton & Lee, who were also auctioneers, were making a claim against the defendant for 25*l.*, for commission in respect of the same sale of the same house. The defendant applied ex parte to the registrar of the county court for an order that Walton & Lee and the plaintiffs should interplead, and the registrar made an order to that effect, and directed that 25*l.* should be paid into court. Notice of the interpleader order was afterwards sent to Walton & Lee, requiring them to appear at the trial of the action and support their title as claimants. They appeared at the trial, and objected that the interpleader order was wrongly made, and that they ought

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not to be made parties to the proceedings. The hearing was adjourned for three days. At the adjourned hearing Walton & Lee renewed their objection, and the county court judge made an order dismissing them from the action, and awarding costs to them. The trial then proceeded, and judgment was given for the plaintiffs, Greatorex & Co., against the defendant, Mrs. Shackle, for the amount of their claim. The defendant afterwards applied to the county court judge for an order for a new trial, and the judge acceded to the application, and ordered a new trial, on the ground that the case came within s. 89 of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), and Order LVII. of the Rules of the Supreme Court, 1883, and Order XXVII., r. 13, of the County Court Rules, 1889, and therefore the interpleader order had been rightly made, and ought not to have been set aside.

The plaintiffs, Greatorex & Co., and Walton & Lee, both appealed from the order for a new trial.

Cagney, for the plaintiffs. This is not a case for interpleader, and the registrar's order was wrongly made. The judge was right in setting that order aside, but was wrong in afterwards ordering a new trial. His finding at the trial shews that the plaintiffs' claim was valid. The claim of Walton & Lee is altogether separate and distinct from that of the plaintiffs. [He was stopped.]

Ernest Pollock, for Walton & Lee, was not heard.

Moyses, for the defendant. The claims of the plaintiffs and of Walton & Lee, being in respect of the same sale of the same property, are claims in respect of the same subject-matter, and the interpleader order was right. Orders such as this are often made in county courts. Probably the defendant is liable to one claim or the other, but not to both. The order by which costs were awarded to Walton & Lee is clearly wrong, for, instead of appearing at the trial, if they objected to the registrar's order, they ought to have applied to the judge to set it aside, which would have been a cheaper and more expeditious course. [He referred to *Barnett* v. *Brown* (1) ; *Murtagh* v. *Barry*. (2)]

(1) 6 Times L. R. 463. (2) 24 Q. B. D. 632.

WILLS J. I am of opinion that the order of the county court judge, directing a new trial, is wrong, and must be set aside. The case seems to me to be really unarguable. An ordinary action for commission in respect of the sale of a house was brought by the plaintiffs, Greatorex & Co., auctioneers, against the defendant, Mrs. Shackle. It turned out that Messrs. Walton & Lee, who were also auctioneers, also claimed commission from the defendant in respect of the sale of the same house. The defendant applied for, and obtained, an interpleader order, ex parte; but before the action came on for hearing Messrs. Walton & Lee received notice requiring them to appear and support their title as claimants. They appeared, and made the very natural objection that there was no jurisdiction to make an interpleader order, because their claim and that of the plaintiffs were not the same. The county court judge thereupon dismissed Messrs. Walton & Lee from the action, and gave them their costs. In so deciding he was right, because they were brought there wrongly. It is contended for the defendant that Messrs. Walton & Lee got too much for costs, because they ought not to have appeared, but ought to have adopted the course of moving to set aside the interpleader order, which would have been less expensive; but that point was for the county court to decide, or might have been raised on taxation; and the question does not arise here. The judge, therefore, made a right order when he dismissed Messrs. Walton & Lee from the action. Then the trial takes place, and judgment is given for the plaintiffs, Greatorex & Co., against the defendant, Mrs. Shackle, the judge finding that there was a contract which entitled the plaintiffs to commission. The amount of their claim, for which they got judgment, was 35*l.* 12*s.*, whereas Messrs. Walton & Lee only claimed to be entitled to 25*l.* for commission. The defendant asked for a new trial, on several most extraordinary grounds, and the application was granted by the county court judge, on the ground that the case came within s. 89 of the Supreme Court of Judicature Act, 1873, and Order LVII. of the Rules of the Supreme Court, 1883, and Order XXVII., r. 13, of the County Court Rules, 1889, and therefore the interpleader order was rightly made, and ought not to have been set aside. It is

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contended in support of this decision that, because commission is being claimed by two different parties in respect of the same sale of the same house, the subject-matter of the claims must be the same; but, as I have pointed out, the claims are wholly different.

I am of opinion that the county court judge had no jurisdiction to grant a new trial, on the grounds on which he has granted one, and his order must be set aside.

WRIGHT J. I am of the same opinion. It may be that, if the point had been taken in the county court that Messrs. Walton & Lee ought not to get as much for costs as they did get, on the ground that they ought to have adopted a cheaper and more expeditious mode of proceeding, a different order as to costs might possibly have been made; but that point does not arise here. On the main point, it seems clear that the grounds on which the county court judge proceeded can have no application. He appears to have assumed that, in all cases where two auctioneers claim commission in respect of the same sale of the same property, the subject-matter of the claims must necessarily be the same. Here the claims were not adverse, in the sense of being claims to the same money, but were entirely different claims. The registrar was wrong, as matter of law, in granting the interpleader order on the materials before him, and the county court judge had no jurisdiction to set aside his own judgment, on the grounds on which he proceeded.

Both appeals allowed.

Solicitor for plaintiff: *Albert Myers.*

Solicitor for defendant: *Arthur Cayley.*

Solicitors for Messrs. Walton & Lee: *Bell, Brodrick & Gray.*

P. B. H.

[IN THE COURT OF APPEAL.]

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May 30.

BRACE *v.* CALDER AND OTHERS.

Master and Servant—Wrongful Dismissal—Partnership, Dissolution of—Nominal Damages.

The defendants, a partnership consisting of four members, agreed to employ the plaintiff as manager of a branch of their business for a certain period. The plaintiff entered into their service under the agreement, but, before the period had expired, two of the partners retired, and the business was transferred to and carried on by the other two. The continuing partners were willing to employ the plaintiff on the same terms as before for the remainder of the period, but he declined to serve them:—

Held, in an action for wrongful dismissal, by Lopes and Rigby L.JJ., Lord Esher M.R. dissenting, that the dissolution of the partnership operated as a wrongful dismissal of the plaintiff, but that he was only entitled to nominal damages.

APPEAL from the judgment of Wright J., at the trial before him without a jury. The facts were as follows:—

By an agreement made on December 23, 1892, between the four defendants, who were at that time carrying on business in partnership as Scotch whisky merchants, and the plaintiff, it was agreed in substance as follows: (1.) that certain existing agreements between the plaintiff and the defendants should be cancelled; (2.) that the plaintiff should during the term of two years, from November 1, 1892, be the manager of the office part of the business of Scotch whisky merchants then carried on by the defendants in the city of London and the surrounding districts, and should receive for his services, as from November 1, 1892, the salary of 300*l.* payable monthly, together with all travelling expenses which he might incur, not exceeding 25*l.* for each period of three months in each year of the engagement; (3.) that the plaintiff might, down to December 31, 1892, but not afterwards, devote so much of his time and attention to a business then carried on by him as might be necessary for winding it up, but should give until that date such reasonable time and attention to the defendants' business as might be necessary for its proper conduct; (4.) that from and after

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January 1, 1893, the plaintiff should give his whole time and attention during business hours to the defendants' business, and should not during his engagement, directly or indirectly, actively engage in any other business, whether alone or jointly with, or as manager, factor, agent, or clerk, or on behalf of any other person or firm; (5.) that the defendants should be at liberty to terminate the agreement at any time during the said period of two years on giving to the plaintiff one calendar month's previous notice in writing of their desire so to do, but should in such case pay to the plaintiff a sum equivalent to the salary he would have received if he had been retained as manager for the full period of two years from November 1, 1892.

The plaintiff entered into the defendants' service under the agreement, and continued to serve them until May 6, 1893, when the partnership between the four defendants was dissolved, and two of the partners retired, the business being transferred to the other two, who continued to carry it on under the old firm's name. No notice of the dissolution was then given to the plaintiff, who in ignorance of it continued to act as manager as before until the end of July, 1893.

In a letter written under the firm's name to the plaintiff on July 26, 1893, mention was made of a transfer of the business, and on July 28 the plaintiff wrote to the firm saying that he noted from their letter that they were about to transfer their business, and should be glad to hear from them in regard to himself, as of course he could not be handed over as a chattel, and that his contract was with certain individuals, neither of whom he could release from their obligations until the conditions of their contract with him were fulfilled. On July 29 the firm wrote to the plaintiff informing him of the retirement of two of the partners. On July 31 the plaintiff wrote to the firm stating that he had not consented to transfer his contract from its original subscribers in any way. Further correspondence took place, in which the continuing partners asserted their right to the services of the plaintiff under the agreement of December 23, 1892, but the plaintiff declined to recognise their right to his services or to act as their servant. The plaintiff was paid his

salary under the agreement to the end of May, 1893, but had not received any salary since that time.

On December 22, 1893, the plaintiff brought his action against the defendants. In the statement of claim the plaintiff alleged that by the dissolution of partnership on May 6, 1893, the defendants had made it impossible for the plaintiff to serve the defendants as agreed, and by so doing terminated the agreement, whereby a sum became payable by the defendants to the plaintiff equivalent to the salary which the plaintiff would have received if he had been retained as manager for the remainder of the full agreed period of two years. Alternatively the plaintiff claimed that, if the agreement was not terminated as aforesaid, the same was valid and subsisting, and that, having always been ready and willing to perform his part of the said agreement, he was entitled to be paid his salary under the agreement up to the time of action brought. By way of further alternative, he alleged that the matters before stated were a breach of the agreement whereby the plaintiff lost the amount of the agreed salary from the date of the said breach to the end of the agreed period, and that by reason of that breach the plaintiff became entitled to the said amount as and by way of liquidated damages, or alternatively to damages.

The learned judge gave judgment for the defendants on the ground that the change of the firm did not operate as a breach of the contract by the defendants to employ the plaintiff, and the plaintiff was bound under the agreement to continue serving the continuing partners.

Feb. 28. *Cock, Q.C.*, and *Clavell Salter*, for the plaintiff. The four defendants jointly contracted with the plaintiff that he should serve them in their business for a period of two years from November 1, 1892. By dissolving partnership and ceasing to carry on that business the defendants broke that contract and prevented the plaintiff from serving in pursuance of it, which he was always ready and willing to do. The plaintiff was not bound under the contract to serve the continuing partners. If he had consented to serve them, it would have been a service under new masters in a new business. There would have been

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in truth a novation of the contract, that is to say, a new contract in substitution for the old one. Having regard to the nature of this contract the plaintiff is entitled under it to recover the amount of the salary which he would have earned if he had continued to serve for the remainder of the two years. The plaintiff was giving up an existing business of his own, and it is submitted that, having regard to the terms of the contract and especially clause 5, the intention was that the defendants should either employ the plaintiff for the full period of two years at a certain salary, or, if they did not, should at any rate pay him his salary for that period.

[LORD ESHER M.R. Clause 5 applies only if notice was given under it.]

Secondly, it is contended in the alternative that, if the dissolution of partnership is not to be treated as a dismissal of the plaintiff, the contract still subsisted, and the plaintiff is entitled to his salary from the end of May, 1893, up to the date of action brought. He actually served till the end of July not knowing of the change of the firm, and was always ready and willing to serve the four partners. Thirdly, it is contended that the dissolution of partnership operated as a wrongful dismissal of the plaintiff, for which he is entitled at any rate to nominal damages. [They cited *Tasker* v. *Shepherd* (1); *Lloyd* v. *Blackburn*. (2)]

Willis, Q.C., and *T. Willes Chitty*, for the defendants. With regard to the suggestion that the plaintiff is entitled to salary for the two months prior to the end of July, he did not shape his claim in that way either in the statement of claim or at the trial, and ought not to be allowed to do so now. His claim was that he was entitled to the whole amount of his salary for the remainder of the two years. Clause 5 of the agreement is inapplicable, for no notice was ever given under it. The sole question really is whether there was a wrongful dismissal of the plaintiff by the defendants, and, if so, to what damages he is entitled. There are two views of the case, in either of which the plaintiff fails. Either the contract to employ was conditional on the business of the partnership continuing to be carried on,

(1) 6 H. & N. 575. (2) 9 M. & W. 363.

and there was no undertaking to continue the business: [They cited in support of this contention *Tasker* v. *Shepherd* (1); *Aspdin* v. *Austin* (2); *Rhodes* v. *Forwood* (3); *Stirling* v. *Maitland* (4); *Hamlyn & Co.* v. *Wood & Co.* (5); *In re English and Scottish Marine Insurance Co., Ex parte Mackay* (6)]: or, alternatively, the service was not put an end to, and the contract continued unbroken notwithstanding the dissolution. The defendants never assumed to dismiss the plaintiff, and, if he had been ready and willing to serve the continuing partners after the dissolution, as it is submitted he ought to have done, he would have been entitled to his salary as against all four defendants. The contract is really that he shall be employed for a certain time to serve in a certain business. It cannot be that because one partner in a firm retires there is a wrongful dismissal of all the servants of the firm. The business is substantially the same after the dissolution as it was before. The continuing partners were for this purpose authorized by the retiring partners to continue to carry it on. The plaintiff was not entitled to refuse to take any orders except from all the four partners. The employers can give instructions through any person to their servant. The plaintiff would have been bound under the agreement before the dissolution of partnership to take orders from the two partners who afterwards continued to carry on the business; and in the same way he was under the agreement bound to obey their orders after the dissolution. He refused to do so, and therefore he was not ready and willing to perform his part under the agreement. If he had been, he would have been entitled as against all the four defendants to performance on their side. [They cited on this point *Dobbin* v. *Foster* (7); *Hodson* v. *Cowley*. (8)] Assuming, however, that there was a wrongful dismissal of the plaintiff, at the most he is only entitled to nominal damages, because in estimating the damages for a wrongful dismissal the fact that the plaintiff might have obtained other employment must be taken into consideration; and here it is proved that the

(1) 6 H. & N. 575.
(2) 5 Q. B. 671.
(3) 1 App. Cas. 256.
(4) 5 B. & S. 840.
(5) [1891] 2 Q. B. 488.
(6) L. R. 5 Ch. 737.
(7) 1 C. & K. 323.
(8) 27 L. J. (Ex.) 205.

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plaintiff could have had employment on the same terms from the new firm and, if he had accepted it, he would have suffered no damage.

Clavell Salter, in reply.

Cur. adv. vult.

May 30. LORD ESHER M.R. In this case the plaintiff had agreed with the defendants, a firm consisting of four partners, that he should serve them in their business for a term of two years. Before the two years had expired two of the partners retired, the two other partners continuing to carry on business. Thereupon the defendants offered to the plaintiff that he should serve the new firm for the remainder of the two years upon the same terms and at the same rate of remuneration as before. He, however, said that the new firm were not the masters he had contracted to serve, and he declined to serve them, which I apprehend he had a right to do. He thereupon brought this action. It was argued in the end that the plaintiff was entitled to damages as for a wrongful dismissal. It was also suggested that there was a contract to employ the plaintiff for a period of two years, and to pay him wages for that period, which had been broken. The plaintiff did in fact serve for a period of two months after the old firm was dissolved, and he has been paid no wages in respect of that service. But the plaintiff did not bring the action in respect of that, and did not rest his case at the trial upon it. If he had shaped his claim in that way, it is obvious that the defendants would have been allowed to pay money into court to meet that claim. It appears to me that, for the purposes of the present appeal, the Court ought not to take any notice of that service for two months, though I understand from what was said during the argument that the defendants are willing to pay the plaintiff in respect of it. With regard to the claim for wrongful dismissal, the defendants did not assume to dismiss the plaintiff. What they did was to alter the constitution of the firm. The old firm ceased to carry on its business, and the business became that of the new firm. For the present purpose it is just the same as if the firm had simply ceased to carry on business. The question is whether that

amounted to a wrongful dismissal of the plaintiff. In my opinion it did not, and I think the authorities support that view. There is no dismissal in such a case in the ordinary sense of the term. It is simply that the firm ceases to carry on business, it might be for the very valid reason that the business could not be carried on except at a loss. I do not think that is a wrongful dismissal. It does not appear to me that there is any contract on the part of the employers that they will carry on the business. There is no express stipulation in this contract that the defendants will carry on the business to the end of the period mentioned, and I do not think that any such stipulation can properly be implied, because the Court has no right to imply a stipulation, unless it is perfectly clear to every reasonable man that such a stipulation is what both parties must have intended. I do not think it is true to say that the employers intended to undertake to carry on their business although it should be at a dead loss. I am therefore of opinion that the plaintiff was not entitled to recover as for a wrongful dismissal. But it was argued alternatively that there was a breach of a contract that the plaintiff should be employed and paid for two years, and he is therefore entitled to succeed as upon a breach of that contract. Assuming that there was such a breach of contract, I think it is obvious that in estimating the damages for it the possibility of the plaintiff's getting other employment equally good for the remainder of the two years must be taken into account. In this case it appears that he could have got such employment: and therefore, if there is such a contract as is alleged and a breach of it, the damages are only nominal. In my opinion, however, there is no breach of any such contract. The contract is that the defendants will employ the plaintiff as their servant in the business for the period of two years, but there is no undertaking in the contract that they will continue to carry on the business. The breach of contract relied on must be that they did not carry on the business for the period of two years. But they never undertook to carry it on. The real contract, in my opinion, is that they will employ the plaintiff for the time mentioned as their servant in the business, if they carry it on. If they do not carry it on,

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there is no service for him to perform. The contract is not for payments to be made to him independently of service but as wages for service in the business. The business ceasing to be carried on there is no service for him to perform.

In my opinion, whether the case be put as one of wrongful dismissal or as breach of a contract such as I have mentioned, the plaintiff has no cause of action, and therefore the judgment in favour of the defendants is right, and this appeal should be dismissed. As, however, my learned brothers are of opinion that the judgment should be entered for the plaintiff for nominal damages, the appeal will be allowed, but without costs either in this Court or in the Court below.

LOPES L.J. This is a case of some difficulty, and it appears to me to be material to refer briefly to the terms of the agreement between the plaintiff and the defendants. By the terms of that agreement the plaintiff was, for the term of two years from November 1, 1892, to be the manager of the office part of the business of Scotch whisky merchants, carried on in the city of London and surrounding districts by the defendants, who were a firm consisting of four partners, and he was to receive for his services as and from November 1, 1892, the salary of 300*l.* payable monthly, together with all travelling expenses incurred by him not exceeding 25*l.* for each period of three months in each year of the engagement. It was provided by clause 5 of the agreement that the employers should be at liberty to terminate the agreement at any time during the period of two years on giving to the plaintiff one calendar month's previous notice in writing of their desire so to do, but should in such case pay to him a sum equivalent to the salary he would have received if he had been retained as manager for the full period of two years from November 1, 1892. Before the two years for which the agreement was to last had expired, two of the partners retired, the other two continuing to carry on business. Till July, 1893, the plaintiff continued to act as manager, not knowing of the change. The continuing partners were then willing to retain him in their service on the same terms as before; but he declined to serve them. The plaintiff claims in this action his whole

salary for the remainder of the period of two years mentioned in the agreement. The question is, what was the effect of the dissolution of partnership? Did it operate as a wrongful dismissal of the plaintiff or a breach of the contract between the plaintiff and the defendants? There is authority to the effect that by the death of one of a firm of masters the servant is discharged unless the contrary is stipulated by the terms of the contract: see *Hoy* v. *M'Lean* (1) and *Tasker* v. *Shepherd*. (2) I express no opinion, however, on the question what effect the death of one of the partners would have had. What took place here was that there was a dissolution of partnership by reason of the retirement of two of the partners, and the business was transferred to the other two who continued to carry on business. That seems to me a stronger case than that of the death of a partner, and, according to my view, it constituted either a wrongful dismissal of the plaintiff or a breach of the contract to employ him for two years. I do not know that it matters much for the purposes of this case in which way it is put. There is nothing in this agreement which indicates that in any event, except that mentioned in clause 5, the employment was not to be for the period of two years. On the contrary, the provision contained in clause 5 of the agreement appears to me strong to shew that there was an express agreement to employ the plaintiff for two years. It appears to me therefore that the plaintiff was discharged by the defendants and was entitled to damages either on the ground that he was wrongfully discharged, or that there was a breach of a contract to employ him for two years. But, in estimating the damages, it must be taken into consideration that the continuing partners were willing to keep him on in their service till the end of the two years at the same salary as before; but he declined to serve them, and therefore it was his own fault that he suffered any loss. Consequently, the damages resulting from the breach of contract would be nominal. It is true that, as the Master of the Rolls has pointed out, he did continue to serve till the end of July, and would have been entitled to claim for that service; but the action was not brought in respect of that. If it had been,

(1) 5 Court Sess. Cas. 3rd Series, 814. (2) 6 H. & N. 575.

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the defendants might have paid into court a sum sufficient to cover that claim. Therefore I do not think that the plaintiff is entitled now to avail himself of it. In the result I am of opinion that there was a breach of the agreement; but the plaintiff is only entitled to nominal damages in respect of it, because in point of fact he did not suffer any loss through it; and the appeal must therefore be allowed and judgment entered for the plaintiff, but only for nominal damages, and with the result as to costs mentioned by the Master of the Rolls.

RIGBY L.J. read the following judgment:—In this case the plaintiff entered into an agreement on December 23, 1892, with the defendants, who were then partners in a business of whisky dealers, to act as their agent for a term of two years as from November 1 of that year at a fixed salary of 300*l.* a year; and there was a clause entitling the employers to determine the agreement altogether before the expiration of the two years on giving a month's notice and paying the unpaid amount of his agreed salary for the unexpired residue of the two years' term. If that clause had been acted upon the agreement would have been brought entirely to an end, and the plaintiff would have had no cause of complaint. What took place was that, before the expiration of the two years' term, that is to say on May 6, 1893, the partnership between the four defendants was put an end to and the business transferred to two of them, who continued to carry on a business under the same firm name. No notice of this dissolution of partnership was given to the plaintiff, and he continued to act as agent in the business as he had done before, until the end of July, 1893. In a letter of July 26 from the firm of Alexander & Macdonald, which was the old firm's name, mention is made of a transfer of the firm's business. In a letter of July 28 the plaintiff says that he shall be glad to hear in regard to himself, as he cannot be handed over as a chattel, and adds that his contract was with certain individuals, neither of whom he can release from their obligations until the conditions of their contract with him are fulfilled. On July 29 the firm write to the plaintiff, giving express notice of the retirement of two of the defendants from the partnership, and the plaintiff replies by

stating that he has not consented to transfer his contract from its original subscribers in any way. Further correspondence then took place in which the two transferees of the business insisted on their right to the services of the plaintiff under the agreement of December 23, whilst the plaintiff refused to recognise their right to claim such services, and declined to act as the agent of the two transferees.

The question now arises as to the rights, if any, of the plaintiff.

Numerous cases were cited with reference to the construction of the agreement; but in the result I am of opinion that the only principle to be derived from them is that the contract is to be construed according to its express terms, and that no term is to be implied which is not rendered reasonably necessary to carry out the plain intention of the parties. In accordance with this principle it seems to me impossible to imply a term that the partnership business shall be conducted by the partners during the two years' term. On the other hand, I think it equally impossible to imply a term that the employers may get rid of their contract by a simple dissolution of partnership, or that the contract implies that, in the event of the retirement of any of the employers, which retirement altogether puts an end to the existing partnership, the defendants' contract may be transferred to the new partnership formed to continue the business. A contract to serve four employers cannot without express language be construed as being a contract to serve two of them. In my judgment the dissolution of the partnership operated as a dismissal of the plaintiff not authorised by law. The clause as to dismissal on a month's notice not having been acted upon, the plaintiff cannot recover as liquidated damages the unpaid part of his salary for the two years' term. On the other hand, the defendants are liable to him for the usual damages for a dismissal without due cause. The plaintiff brought his action on December 22, 1893, before the two years' term came to an end. In my judgment the defendants are entitled in mitigation of damages to put forward the offer of an engagement on the same terms made by the continuing partners. I see nothing in the evidence to shew that this in a pecuniary sense

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would have been of a less value to him than his engagement to serve the four defendants. So far it would seem that the plaintiff's damages would be nominal. He did, no doubt, actually continue to render services until the end of July, and, as his salary had only been paid up to the end of May, he would be entitled to the amount of two months' salary, which at the rate of 300*l.* a year would be 50*l.* But I quite agree that that was not the way in which he shaped his case. He framed his claim on a wrong construction of the contract, and, if he had limited it to 50*l.*, the whole of the cost of this litigation would probably have been rendered unnecessary. I therefore concur in the view of Lopes L.J. that the appeal should be allowed and judgment entered for the plaintiff for nominal damages, and that there should be no costs either of the appeal or in the Court below.

Appeal allowed.

Solicitor for plaintiff: *W. H. Dale.*
Solicitors for defendants: *Hatchett-Jones & Co.*

E. L.

C. A. 1895 *May* 17.

[IN THE COURT OF APPEAL.]

In re NORTH. *Ex parte* HASLUCK.

Bankruptcy—Act of Bankruptcy—Computation of Time—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 1.

By the Bankruptcy Act, 1890, s. 1, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, and the goods have been held by the sheriff for twenty-one days:—

Held, that the sheriff must hold the goods for twenty-one whole days, in the computation of which the day on which the seizure is made is to be excluded.

APPEAL from the decision of Vaughan Williams J. upon an application by the trustee in bankruptcy for an order calling upon the execution creditor and his solicitor to pay over to the trustee the proceeds of an execution against the bankrupt's goods, on the ground that at the time of the sale they had notice of a prior act of bankruptcy on the part of the bankrupt. The facts

are fully set out at the commencement of the judgment of Vaughan Williams J.

1894. Dec. 3, 4. *Cooper Willis, Q.C.*, and *C. Hyde*, for the trustee.

Reed, Q.C., and *Ringwood*, for the execution creditor.

Cur. adv. vult.

1895. March 19. VAUGHAN WILLIAMS J. The question in this case is whether the execution creditor is entitled to retain as against the trustee in bankruptcy a sum of money which he received under an execution levied on the bankrupt's goods. The trustee also claims to be entitled to recover the sum of money thus received from Mr. Foster (the solicitor of the execution creditor), who paid over the money to his client. The execution creditor obtained judgment on May 19, 1893, and the fi. fa. was delivered to the sheriff on the same day. The sheriff, however, did not in fact go into possession until June 27. After possession was taken a summons was taken out for leave to sell by private contract, and an order was made authorizing such sale. The purchase-money thereunder was paid to the sheriff on July 18, and on the same day he went out of possession. The sheriff retained the money so paid for fourteen days in compliance with s. 11 of the Bankruptcy Act, 1890, and in August Mr. Foster (the solicitor of the execution creditor) received from the sheriff 1028*l.* 3*s.*, being the amount of the levy, costs, and interest due to the execution creditor. Mr. Foster, after deducting the amount of his charges, paid the balance, amounting to 1011*l.* 3*s.*, to the execution creditor. In fact, the sheriff received notice on July 19 that two petitions had been filed against the debtor; but he gave no notice of this to the execution creditor or his solicitor; and I find that neither the execution creditor nor Mr. Foster had any notice of the filing of the said petitions at the time of completion of the execution by seizure and sale, nor of any other act of bankruptcy, unless an act of bankruptcy was committed by the sheriff holding the goods seized under the levy for twenty-one days. The sale itself was of course an act of bankruptcy; but as such act of bankruptcy

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dates from the completion of the sale, it does not override the title of the execution creditor, because it is not an available act of bankruptcy at the time of the completion of the execution. On December 13 a receiving order was made against the debtor on the petition presented on June 14, which was followed by adjudication on January 26, 1894.

It becomes under these circumstances all-important to ascertain whether there was, in fact, a holding by the sheriff for twenty-one days prior to the sale. If there was, it seems to me that neither the execution creditor nor his solicitor can be heard to say that they had not notice of such possession and the act of bankruptcy thereby constituted. Whether there was or was not possession for twenty-one days depends upon what is the proper mode of computation of time. There seems no doubt that by the common law when an act is complete on a particular day, and it becomes necessary to calculate from that day, the day on which the act was so completed must be reckoned in the computation. This is the principle established by *Rex* v. *Adderley* (1), and it was upon this basis that it was held in *Glassington* v. *Rawlins* (2), with regard to the act of bankruptcy grounded upon lying in prison for two months after arrest, that the day of arrest must be included in the computation of time. The principle, however, was rendered inapplicable to bankruptcy proceedings by the interpretation clause which appeared in the various bankruptcy statutes prior to that of 1869. Now s. 276 of the Bankruptcy Act, 1849, runs thus: "In all cases in which any particular number of days is prescribed by this Act . . . for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day. . . ." Then s. 114 of the Bankruptcy Act, 1869, varied the terms of s. 276 of the Act of 1849 as follows: "Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of such limited time the same shall be taken as exclusive of the day of such date or of the happening of such event, and as commencing at the beginning of the next following

(1) 2 Doug. 463. (2) 3 East, 407.

day; and the act or proceeding shall be done or taken at latest on the last day of such limited time according to such computation." It is obvious that this section differs in several respects, and in particular in the omission of the words "or for any other purpose," from s. 276 of the Act of 1849. I do not know why those words were omitted. It may be that the legislature thought that the wider terms of the Act of 1869 rendered it unnecessary to comprise them; but it might at least be argued that the intention was that in future the common law principle should apply except in the cases specified in the section. Or it may be that the reason of their omission was that under the Act of 1869 there was not only no such act of bankruptcy as lying in prison for a given time, but no other act of bankruptcy which depended on duration of time. Now, s. 141 of the Bankruptcy Act, 1883, in substance re-enacts s. 114 of the Bankruptcy Act of 1869; and that brings one to the Bankruptcy Act, 1890, which is an amending Act, and which first introduces a new act of bankruptcy depending on duration of time, and that is, the holding of the goods by the sheriff for twenty-one days; and I have to say whether the day upon which the sheriff seized is or is not to be computed in reckoning the twenty-one days. I do not feel disposed, however, to revert to the common law principle unless the law clearly compels me to do so, because it is much more convenient to have one rule of computation of time in bankruptcy, and it is not readily to be assumed that the legislature intended to establish two rules. I think, therefore, I ought, if I can, so to construe s. 141 of the Bankruptcy Act, 1883, that there shall be but one rule in computing time under the Bankruptcy Acts. Now, what are the words of s. 141? [The learned judge read the section, and continued:—] Then the Bankruptcy Act, 1890, s. 1, says that a debtor commits an act of bankruptcy if his goods are seized under an execution, and have been either sold or held by the sheriff for twenty-one days. It seems to me that the limit of twenty-one days is really an allowance of time to the debtor within which to redeem if he can. Therefore I say that, as the goods were seized on June 27 and sold on July 18, there was not, in my judgment—if June 27 be excluded—a holding by the sheriff for twenty-one days.

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Under those circumstances, I hold that the execution creditor is not bound to hand over this money on the ground that he received it with notice of an act of bankruptcy.

H. L. F.

The trustee appealed.

May 17. *Cooper Willis, Q.C.*, and *C. Hyde*, for the trustee. The holding of goods by the sheriff for twenty-one days operates to make the execution itself void as against the trustee in bankruptcy of the execution debtor: *Burns-Burns's Trustee* v. *Brown* (1); and in the present case the sheriff held the goods for twenty-one days before the execution was completed. Where time is to be computed from the doing of an act, the day on which the act was done is to be included in the computation: *Clayton's Case* (2); *Bellasis* v. *Hester* (3); *Glassington* v. *Rawlins* (4); *Higgins* v. *McAdam* (5); the day on which the sheriff seized is therefore to be included, and, as the law does not regard fractions of a day, he was legally in possession for the whole of that day. If, however, that day is to be excluded, then, by reason of the same rule as to fractions of a day, July 18, the day on which the sheriff completed the sale and went out of possession, was in contemplation of law a day, the result being that in either case the sheriff held the goods for twenty-one days. The case does not fall within s. 141 of the Bankruptcy Act, 1883, for there is no time appointed for the doing of an act or taking a proceeding within the meaning of that section. [He also cited *Figg* v. *Moore* (6); *Fitzhugh* v. *Dennington*. (7)]

H. Reed, Q.C., and *Ringwood*, for the execution creditor. The intention of the Act of 1890 was either to give the debtor twenty-one days within which he might redeem his goods and avoid the commission of an act of bankruptcy, or to appoint a time for the commission of an act of bankruptcy; but the result of the argument on behalf of the trustee is that that period of twenty-one days is to be cut down to twenty days and a part of a day. There is no general rule that, in computing time from an

(1) [1895] 1 Q. B. 324.
(2) 5 Rep. 1.
(3) 1 Ld. Raym. 280.
(4) 3 East, 407.
(5) 3 Y. & J. 1.
(6) [1894] 2 Q. B. 690.
(7) 2 Ld. Raym. 1094.

act or event, the day on which the act is done is to be either included or excluded: its inclusion or exclusion must depend on the reason of the thing in the particular case: *Lester* v. *Garland*. (1) This being a highly penal enactment, it must be construed in the way most favourable to the debtor, who is the person chiefly affected by it. It is immaterial whether the case falls within s. 141 of the Act of 1883; if it does not, no other provision is made for it in the Act or rules, and it therefore comes within rule 353 of the rules of 1886, which provides that where no other provision is made by the Act or rules the present law, practice and procedure in bankruptcy matters is to remain in force, and the hitherto universal practice in bankruptcy as to computing time is continued by that rule, coupled with s. 78 of the Act of 1869, which saved the practice then existing in bankruptcy. [He also cited *In re Railway Sleepers Supply Co.* (2)]

Cooper Willis, Q.C., in reply.

LORD ESHER M.R. I think that this appeal should be dismissed. No general rule exists for the computation of time either under the Bankruptcy Act or any other statute, or, indeed, where time is mentioned in a contract, and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made. Notwithstanding the elaborate array of authorities which have been cited to us, they seem on being sifted to contain no binding rule to the effect that time must be computed according to a hard and fast rule: that seems clear from the judgment in *Lester* v. *Garland* (1), in which Sir William Grant, after a learned examination of the whole subject, laid down what I conceive to be the wholesome view that no general rule exists. A great deal of difficulty has been caused in the administration of the law, and particularly of the common law, by decisions in which technical rules have been formulated which were not true—that is, were not in accordance with the facts of the case. To say that by the common law a part of a day is the whole of a day is to say something which is contrary to the truth; it is a technical rule which was imposed

(1) 15 Ves. 248. (2) 29 Ch. D. 204.

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upon the law with the result of bringing the law into disrepute. It is immaterial whether these older decisions were right in the particular cases; if they, or any of them, laid down any general rule as to the mode of computing time, that rule has been departed from in recent times, and no longer exists.

Lord Esher M.R.

The statute which we have to construe for the purpose of deciding how the period of time mentioned in it is to be computed is a Bankruptcy Act, and enacts a new act of bankruptcy, the commission of which is to be determined by a computation of time. Why, in computing time for such a purpose, are we to be bound by old decisions as to the time at which a person becomes of age, or at which he may make a will? Such cases have nothing in common with the present, in which a new period of time is prescribed for a new purpose. We must determine, therefore, what is the proper mode of computing a period of time under this statute.

If we construe s. 1 of the Act of 1890 according to the ordinary English meaning of the words, it enacts that certain consequences are to happen if the sheriff holds for twenty-one days goods seized by him under an execution: an act of bankruptcy is committed if he holds them for that time. The ordinary meaning of the words is that he must hold them for twenty-one days; but we are told that under a technical rule of construction the section is satisfied if he holds them for twenty days and a part of a day. Which is right? It is clear to me that when the section says that a certain result is to follow if the sheriff holds the goods for twenty-one days, it means twenty-one days and not twenty days and a fraction; he must hold them for twenty-one whole days. A fair rule of construction seems to be that where the computation is to be for the benefit of the person affected as much time should be given as the language admits of, and where it is to his detriment the language should be construed as strictly as possible. Here the result may be to make a man a bankrupt, which is not a benefit to him, nor necessarily to the whole of his creditors. The bankruptcy law is a law of public social policy, and affects in a very detrimental manner the status of those who are brought under its operation; in old times, indeed, to make a man a bankrupt was to make him a criminal;

therefore, in a Bankruptcy Act such a provision as the one in question ought to be construed as much for the debtor's benefit as possible.

There is another point of view which leads me to the same conclusion. Bankruptcy is the creature of statute, and under a long series of bankruptcy statutes the same practice as to computing time has been followed, though for different purposes or results; the practice is a perfectly well-known one, the rule in bankruptcy being to exclude the first day or part of a day, and to begin the computation of time on the first whole day. The practice and procedure in bankruptcy existing in 1883 is to be followed where not altered by the Act of that year or by a rule, and no rule has been passed to alter the practice in bankruptcy as to computing time. Again, there is the rule of construction that if a statute, which so affects a man's status as to be in effect a penal enactment, is capable of two constructions, that one should be adopted which is most favourable to the person affected. Applying this rule, the mode of calculating the twenty-one days ought to be in favour of the debtor doing something which would prevent his becoming a bankrupt at all, and we ought to construe this section as meaning that the first day, or part of a day, is to be excluded from the computation, which should begin on the day after the date of the seizure. The learned judge was therefore right, and his decision must be affirmed.

A. L. Smith L.J. I am of the same opinion. The question is a short one, and comes to this, whether goods which have been held by the sheriff for twenty days and a fraction of a day have been held by him for twenty-one days. It is impossible to say that holding goods for less than the prescribed time is an act of bankruptcy, although it has been argued that when the statute enacts that they shall be held for twenty-one days a shorter time is sufficient, and that twenty days and a fraction are the same as twenty-one days. It is contended that the old authorities shew that formerly, when time had to be computed from the doing of an act, the first day—that is the day on which the act was done—was included, and that that rule is applicable

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to the present case. But it has been shewn from subsequent cases that there is no such universal rule, and that in the reckoning of time each case must depend on its own circumstances and subject-matter, and for this I need only refer to the judgment of Sir William Grant in *Lester* v. *Garland* (1), to that of Kelly C.B. in *Isaacs* v. *Royal Insurance Co.* (2), and of Chitty J. in *In re Railway Sleepers Supply Co.* (3) To say, therefore, that a rule of law compels us to say that to hold goods for twenty days and a fraction of a day is the same as to hold them for twenty-one days is to say that which is not a fact.

Speaking for myself, I think there is another ground upon which the same conclusion may be arrived at. Whatever may have been the rule prior to 1849, the Bankruptcy Act of that year provided by s. 276 that where any particular number of days was prescribed by the Act, or by any rule made under it, for the doing of any act or for any other purpose, they were to be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day. That is a positive enactment, and remained in force till 1869, having been re-enacted in the meantime by s. 229 of the Act of 1861. By s. 114 of the Act of 1869, an alteration was made in the definition of the mode of computation of time, but I do not think that that section, or s. 141 of the Act of 1883, which in substance re-enacts it, applies to the present case. The old mode of computation seems to have been preserved by s. 78 of the Act of 1869, which enacted that until the practice was altered by rules made under the Act, and so far as such rules did not extend, the old principles and practice of the Bankruptcy Court were to be preserved. The old practice having been to exclude the first day in the computation of time, and no rule affecting it having been made under the Act of 1869, that practice was preserved while that Act was in force. When we come to consider the Act of 1883, we find the same state of things: s. 141 of that Act re-enacted s. 114 of the Act of 1869; and rule 353 of the Bankruptcy Rules of 1886 provides that "when no other provision is made by the Act or these rules the present law,

(1) 15 Ves. 248.

(2) L. R. 5 Ex. 296.

(3) 29 Ch. D. 204.

procedure and practice in bankruptcy matters shall, in so far as applicable, remain in force." No provision has, as far as I am aware, been made by that Act or the rules under it affecting the computation of time in a case like the present, and I think therefore that the old practice remains in force, and that the first day must be excluded, with the result in the present case that the sheriff did not hold the goods for twenty-one days, and there was consequently no act of bankruptcy which could deprive the creditor of the fruits of his execution.

Rigby L.J. I am of the same opinion, and I desire to base my decision on the general principle apart altogether from the statutes; I am not satisfied that I should arrive at the same conclusion as was arrived at by the learned judge in the Court below upon the Bankruptcy Acts and rules. We have to resolve this question: Has the sheriff held for twenty-one days? Unless the first day be taken into account, he only held for twenty. In common sense, and according to the ordinary use of language, he only held for twenty days and a fraction: why are we to be driven to say, contrary to the fact, that he held for twenty-one? It is said that the law takes no account of fractions of a day; but that is not a correct statement, if it means that the law will never inquire at what time a particular event took place; for instance, a difference of five minutes in the registration of two deeds in the Middlesex Registry would be sufficient to determine a question of priorities, and the time of their respective registrations would, as a matter of course, be looked at. If the doctrine is cut down to the proposition that in the computation of time the law takes no account of fractions of a day, then it means one of two things: either that the fraction of a day is to be taken as a whole day, or that it is to be excluded altogether from the calculation; it does not help us to determine in any particular case whether the part is to be left out or kept in.

It was contended before us, and it seems at one time to have been thought to be law, that where a fact or event was mentioned from which a given period of time was to be reckoned, the Court was bound to reckon the portion of the day on which the act was done as though it were a whole day, and to reckon it as the first day

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of the period. That doctrine underwent a thorough examination in *Lester* v. *Garland* (1), at the hands of Sir W. Grant, who considered the cases in which the first day had been included or excluded, and came to the conclusion (which I think was inevitable) that there was no general rule on the subject. His own view was that, if there were to be a general rule, it ought to be one of exclusion, as being more reasonable than one to the opposite effect. His classification of the cases shews that where the calculation is in favour of a person, the construction should be adopted which is more favourable to him. In the case of a sheriff, for instance, it is more in his favour to include the day on which the act is done than to exclude it, and on that ground it is included; but where, to take another example, something has to be done which is necessary to complete a title, the first day is excluded, otherwise there would be a cutting down of the time allowed for doing the act. In my opinion, although Sir W. Grant did not put the proposition in so many words, his judgment leads us to the conclusion that the question of whether the day on which the act is done is to be included or excluded must depend on whether it is to the benefit or disadvantage of the person primarily interested. But whether or no the proposition is to be put so high, we have here a statute which does not say twenty-one days from taking possession; and it is only to cases where a terminus is mentioned that any such general rule was ever held to apply. The present is an a fortiori case; no terminus is mentioned, and the only question is whether the sheriff held for twenty-one days. Why should we say that he did, if there is no general proposition of law binding us to say so? I can find no such proposition, and I agree that the learned judge in the Court below was right.

Appeal dismissed.

Solicitors for trustee: *F. W. & H. Hilbery.*
Solicitor for execution creditor: *H. T. P. Foster.*

(1) 15 Ves. 248.

W. J. B.

THE QUEEN v. VESTRY OF ST. GEORGE, HANOVER SQUARE.

1895
June 18;
July 4.

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 69, 135, 138 —*Pollution of River—Sewer—Order to Vestry to Construct—Powers of County Council.*

Certain houses in the metropolis being drained directly into the Thames, the London County Council, in order to prevent the continued pollution of the river, made an order upon the vestry of the parish in which the houses were situate to make a new sewer according to a specified plan to carry the drainage of the houses into the nearest main sewer :—

Held, that the county council had no power to make the order.

MANDAMUS to the vestry of St. George, Hanover Square.

In the year 1894 the drainage from three houses, Nos. 102, 103, and 104, Grosvenor Road, adjoining the Thames Embankment, and within the parish of St. George, Hanover Square, was being discharged by means of a single pipe under the Grosvenor Road directly into the Thames; and upon December 4 in that year the London County Council, with the object of preventing the further pollution of the river, and purporting to act under s. 138 of the Metropolis Local Management Act, 1855, made an order upon the vestry of the parish requiring them to construct a new sewer of specified dimensions, and in accordance with a specified plan, to carry the drainage of the said houses into a certain low level sewer belonging to the county council. The houses in question had been in existence and had been drained in the same manner into the Thames from a date prior to the passing of the Metropolis Management Act, 1855. The vestry refused to obey the order on the ground that it was made without jurisdiction. The council thereupon obtained a rule for a mandamus to the vestry to obey the order.

Channell, Q.C., and *Macmorran*, shewed cause. The order was ultra vires. Sect. 138 (1) only empowers the council to order

(1) By 18 & 19 Vict. c. 120, s. 69, the vestry of every parish in Schedule A to that Act are to "cause to be made . . . such sewers . . . as may be necessary for effectually draining their parish . . . provided always that no new

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the vestry to carry out those sewerage works the duty of executing which is directly imposed upon the vestry by the Act. But under s. 69, it is only where their parish is not effectually drained that any duty is imposed on the vestry to make a new sewer. And here it is not contended that these houses are not effectually drained. The objection is that they pollute the river. But with the prevention of the pollution of the river the vestry have nothing to do. That is a matter for the county council themselves. The intention of the Act was that the expense of the purification of the river, and of the construction of sewers for that purpose, should be borne by the whole metropolis at large. By s. 135 the Metropolitan Board of Works, whose representatives the county council now are, were expressly given powers to make sewers for that purpose, which powers were by subsequent legislation (21 & 22 Vict. c. 104) converted into a duty. Sect. 138 has nothing to do with the purification of the river; and the council are seeking to use that section for the purpose of throwing upon the vestry an obligation which lies upon themselves.

Bosanquet, Q.C., and *English Harrison*, for the London County Council. The pipe through which these three houses were drained into the river was a sewer within the definition clause, s. 250. The council had, therefore, power under s. 138 to make

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sewer shall be made without the previous approval of the Metropolitan Board of Works."

By s. 135, the main sewers "shall be vested in the Metropolitan Board of Works and such board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the River Thames in or near the metropolis."

By s. 138, "The Metropolitan Board of Works shall from time to time, in order to secure the efficient maintenance of the main and general sewerage of the metropolis, make such general or special order as to them may seem proper for the guidance direction and control of the vestries of parishes and district boards in the levels construction alteration and maintenance and cleansing of sewers in their respective parishes or districts, and for securing the proper connection and intercommunication of the sewers of the several parishes and districts and their communications with the main sewers vested in the said Metropolitan Board, and generally for the guidance direction and control of vestries and district boards in the exercise of their powers and duties in relation to sewerage."

a special order for securing its proper connection with a main sewer. By the Act in which that section is contained there was no duty imposed on the board to take the necessary steps to prevent the pollution of the river: they were only given powers which they could exercise or not as they chose. They had the option of doing the work themselves or of calling upon the vestry to do it under s. 138. That section must be read without reference to the later Act, by which a duty to do the work was imposed on the board.

WRIGHT J. In this case the question is whether the London County Council, as representing the old Metropolitan Board of Works, had power to order the vestry of St. George, Hanover Square, to construct a new sewer for the purpose of taking the sewage from certain houses situate on the Thames Embankment into one of the main sewers at some distance inland. By s. 69 of the Metropolis Management Act, 1855, the vestry of each parish have imposed upon them a duty to make such sewers as may be necessary for effectually draining their parish, subject to the proviso that they shall make no new sewer without the previous approval of the Metropolitan Board of Works. Then, by s. 138, "The Metropolitan Board of Works shall from time to time, in order to secure the efficient maintenance of the main and general sewerage of the metropolis, make such general or special order as to them may seem proper for the guidance direction and control of the vestries . . . in the levels construction alteration and maintenance of sewers in their parishes, and for securing the proper connection and intercommunication of the sewers of the several parishes and their communications with the main sewers vested in the said Metropolitan Board, and generally for the guidance direction and control of vestries in the exercise of their powers and duties in relation to sewerage." And the question is whether that section authorized the board to make such an order upon the vestry as was made here. I think it did not. In my view, that section was not intended to empower the board to take the initative by ordering specific new works of sewerage, but simply to give them a control over the construction and arrangement of new local sewers, the initiative as to which was left to

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Wright J.

the vestry. If the vestry made a sewer, it had to be made in such a way as the board approved. If the vestry did not choose to make a new sewer, the board had no power to order them to make one. There is a case of *Reg.* v. *Vestry of St. Luke's, Chelsea* (1), which seems to support this view. There a private person obtained a mandamus to the vestry to construct new sewers in a part of their district, and upon demurrer to the return it was held that the mandamus ought not to go, on the ground that certain conditions precedent had not been complied with. The whole matter was fully argued, and it does not seem to have occurred either to counsel or to any member of the Court that the board of works had such a power as the county council now claim; for if it had the Court would probably have said that the proper remedy was to apply to the board for an order in the first instance, and not to come to the Court for a mandamus.

KENNEDY J. It being conceded upon the facts of this case that the object of the order made by the county council upon the vestry was not to ensure the effectual drainage of the parish, but to prevent the outfall of certain sewage into the Thames, I am satisfied that the order was one which the council had no power to make. By s. 135 of the Act of 1855 power was given to the board to make such sewers as they thought necessary to prevent sewage passing into the Thames. But if they had power under s. 138 to order the vestry to make a sewer for that purpose, the powers given by s. 135 were wholly needless and superfluous. I think the intention of the Act was that, if the board thought a sewer was necessary for that purpose, they should make it themselves, not that they should order the vestry to make it for them. Further, I agree with my brother that, even where the object of the order is to ensure the effectual drainage of the parish, the central authority have no power to order the vestry to make specific sewers, but have only a power of supervision and control over the making of sewers which the vestry proposes to make. It may be that under the Rivers Pollution Prevention Act, 1876, or some other statute dealing with that subject, the vestry may be indirectly compellable to

(1) 31 L. J. (Q.B.) 50.

execute the work which they have been ordered to do here; but that is not the question. The only question is whether the county council had power to order them to do it; and I think it is clear they had not. The rule for a mandamus must, therefore, be discharged.

Rule discharged.

Solicitor for London County Council: *Blaxland.*
Solicitors for vestry: *Caprons & Co.*

J. F. C.

[COMMERCIAL COURT.]

1895
June 20.

UNION MARINE INSURANCE COMPANY *v.* BORWICK.

Insurance (Marine) — Policy — Reinsurance — Collision Clause — "Piers or similar Structures."

A vessel, insured by the plaintiffs, was driven by the wind and sea against a sloping bank, formed outside the breakwater of a harbour by laying down loose boulders in the sea to protect the breakwater, and was totally lost. The plaintiffs, having paid for a total loss, sought to recover under a contract of reinsurance, by which the defendant insured "against risk or loss or damage through collision with any other ship or vessel or ice or sunken or floating wreck or any other floating substance, or harbours or wharves or piers or stages or similar structures":—

Held, that the loss was caused by collision, and not by stranding, and therefore came within the words "loss or damage through collision with . . . piers or stages or similar structures," and the plaintiffs were entitled to recover.

TRIAL of action in the Commercial Court before Mathew J.

The plaintiffs, an insurance company carrying on business at Liverpool, sued the defendant, an underwriter at Lloyd's, on a contract of reinsurance, called a collision contract, dated July 20, 1894, and underwritten by the defendant.

By the collision clause, clause 3 of the contract of reinsurance, the defendant insured "against risk or loss or damage through collision with any other ship or vessel or ice or sunken or floating wreck or any other floating substance, or harbours or wharves or piers or stages or similar structures, and including a running-down clause, as per original policies."

The facts proved at the trial were shortly as follows. The plaintiffs had insured two vessels, the *Kirkmichael* and the *Osseo*.

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On December 22, 1894, during a heavy gale, the *Kirkmichael*, while endeavouring to clear the end of the breakwater of Holyhead harbour, was driven by the force of the wind and sea against a sloping bank or mound called the toe of the breakwater, which had been artificially formed by laying down in the sea loose boulders taken from the mountains. The bank or mound was about 250 feet wide at the level of low water, and about 450 feet wide at the base, which was in about 50 feet of water. The inclination of the slope was 12 to 1 down to low water mark, 5 to 1 down to about 10 or 12 feet below low water mark, and from that point to the bottom about 2 to 1. The *Kirkmichael* drifted on to the bank nearly broadside on, and became a total loss.

On the morning of December 30, 1894, also during a heavy gale, the *Osseo* was driven on to the same bank, almost in the same manner as the *Kirkmichael*, at a spot about 50 feet distant from where the *Kirkmichael* was wrecked, and also became a total loss.

The plaintiffs, having paid under their policies in respect of each of the two vessels as for a total loss, now claimed to recover against the defendant under the clause in the contract of reinsurance above set out.

Bigham, Q.C. (*T. G. Carver* with him), for the plaintiffs. The losses in respect of which the plaintiffs have paid, and now seek to recover from the defendant under the contract of reinsurance, come within the words of the collision clause in that contract, "loss or damage through collision with . . . harbours or wharves or piers or stages or similar structures." The decision of Barnes J. in *The Munroe* (1), so far as it affects the present case, is in favour of the plaintiffs.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendant. The case of *The Munroe* (1) is not in point here, for each case must depend on its own facts. The evidence in the case of both these vessels shews a stranding, not a collision. To constitute a collision the upper works of the vessel should strike against some foreign body, such as another vessel, or an iceberg; but in a case like this, where a vessel runs aground on a bank

(1) [1893] P. 248.

of boulders, which practically forms part of the coast, striking the bank with her keel, she does not come into collision, within the meaning of the contract, but simply runs aground.

MATHEW J. This case has now been thoroughly discussed, and the only question for my decision is, whether the facts which occurred in the cases of these two vessels amounted to loss or damage through collision, within the meaning of the words contained in clause 3 of the contract of reinsurance. It is contended that the losses in the present case do not come within a clause insuring against loss by collision, but the clause in question here is much more extensive in its operation. It refers to collision with a floating substance on the one hand, and to collision with a permanent structure on the other hand. It then proceeds to include collision with harbours, wharves, piers, stages, or similar structures. The words of the clause which are applicable to the present case are the words "piers or similar structures." The evidence shews that both these vessels struck and were wrecked on the toe of the breakwater outside the harbour at Holyhead. The breakwater in question was made by the deposit of a number of large boulders, forming the toe of the breakwater, behind which the wall of the breakwater itself is built. I am of opinion that the words "pier," "breakwater," and "toe" all denote one and the same structure, and therefore that the expression "collision with piers . . . or stages or similar structures" covers the present case. I cannot distinguish collision with from striking against. It has been contended on behalf of the defendant that in order to constitute a collision the upper works of the ship must strike some one of the things referred to in the clause in the contract, and that there were not collisions in the present case, because it appears that it was the keels of these two vessels which struck against the toe of the breakwater. According to the view which I have expressed as to the meaning of the words, that argument must be unavailing; and I am therefore satisfied that this was a case of damage by collision with a pier or similar structure, within the meaning of the 3rd clause in the contract of reinsurance.

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As the amount of the damages is agreed, it becomes unnecessary to hear any further evidence, and I give judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

P. B. H.

1895
May 2

THE MANCHESTER TRUST, LIMITED *v.* FURNESS, WITHY & CO., LIMITED.

Ship—Charterparty—Bill of Lading—Liability of Owner of Chartered Ship on Bills of Lading signed by Master.

A charterparty, which was in other respects in the form of an ordinary time charter, contained the following provision: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under the charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities (if any) that may arise from the captain signing bills of lading, or in otherwise complying with the same":—

Held, that this clause was insufficient to exonerate the shipowners from liability to the indorsee of a bill of lading signed by the captain which did not contain the clause. In order to effect such a protection to the shipowner, there must be an explicit statement to this effect in the bills of lading signed by the captain.

ACTION tried by Mathew J. in the Commercial Court without a jury.

By a charterparty dated April 7, 1893, Messrs. Benchimol & Sobrinho, of Manchester, chartered the defendants' steamship *Boston City* for six months, to trade between ports in the United Kingdom and North and South America. The vessel was let "with full complement of officers, seamen, engineers and firemen"; and the owners agreed to provide for and pay all the provisions and wages of the captain, officers, engineers, firemen and crew; but the charterparty contained the following provision:—

"The captain and crew, although paid by the owners, shall be

the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under the charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities (if any) that may arise from the captain signing bills of lading, or in otherwise complying with the same."

The *Boston City* was loaded at Cardiff with coal, and on April 26, the loading being completed, the master signed bills of lading in the form stated in the judgment, not containing the last-mentioned clause or any reference thereto.

The bills of lading were indorsed to the plaintiffs, who were bankers at Manchester, as a security for an advance of 3217*l.* 10*s.*, and were forwarded by the plaintiffs to their agents at Rio de Janeiro, with instructions that the coal should be delivered against payment of the amount advanced.

The charterers directed the master to sail for Buenos Ayres instead of Rio de Janeiro, assuring him that the coals belonged to them, and that the bills of lading would be forwarded there. On the arrival of the *Boston City* at Buenos Ayres, the master was informed by the charterers' representative there that the bills of lading were in his possession. The master, relying on this statement, did not require the production of the bills of lading, but allowed the coal to be discharged. The coal was sold, and the proceeds were received by the charterers, who afterwards stopped payment. The plaintiffs, not having been repaid their advance, now sued the defendants for damages for the non-delivery of the coal at Rio de Janeiro. The defendants denied liability on the ground that, under the express terms of the charterparty, the master had acted as agent of the charterers and not of the shipowners.

Joseph Walton, Q.C., and *T. G. Carver*, for the plaintiffs. The defendants are liable for the acts of the master, who is their agent, notwithstanding the provision in the charterparty. The master was engaged and paid, and could only be discharged, by the shipowners. Where, as in this case, the shipowner retains possession and control of the vessel, he is liable for

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the acts of the master: *Baumwoll Manufactur von Scheibler* v. *Furness*. (1)

There must be a complete demise of the ship in order to exonerate the shipowner from liability: *Colvin* v. *Newberry* (2); *Sandeman* v. *Scurr* (3); *Omoa Coal and Iron Co.* v. *Huntley*. (4) The plaintiffs had no knowledge of the provisions of the charterparty, and cannot be affected by it: *Serraino* v. *Campbell* (5); *Erichsen* v. *Barkworth*. (6)

Finlay, Q.C., and *Holman*, for the defendants. On the construction of the charterparty the master was the agent of the charterers, and not of the shipowners, when he signed the bills of lading. The case is really governed by *Baumwoll Manufactur von Scheibler* v. *Furness* (1), where the charterparty was very similar in form. The charterers may be liable under such a provision for the acts of the master, although the shipowners retain rights over the ship: *Schuster* v. *McKellar*. (7)

It is immaterial whether the plaintiffs had notice of the terms of the charterparty or not. The charterparty in fact transferred all liability from the shipowners to the charterers. The master, for the purpose of navigation, may remain the servant of the owners; but all liability for his acts as regards the carriage and delivery of the cargo was transferred to the charterers.

Cur. adv. vult.

May 27. MATHEW J. This was an action by the plaintiff company to recover damages from the defendant company for the non-delivery of 2200 tons of coal shipped at Cardiff and deliverable at Rio under bills of lading signed by the master of the defendants' steamship, the *Boston City*. The defendants denied their liability on the ground that the bills of lading had not been signed by the master as their agent, but as agent for the charterers of the vessel, a firm of Benchimol & Sobrinho.

The loading of the vessel was completed on April 27, 1893,

(1) [1893] A. C. 8.
(2) 1 Cl. & F. 283.
(3) L. R. 2 Q. B. 86.
(4) 2 C. P. D. 464.
(5) [1891] 1 Q. B. 283.
(6) 3 H. & N. 894.
(7) 26 L. J. (Q.B.) 281.

and on that day the master signed the bills of lading, which were in the following form:—

"Shipped in good order, and well conditioned, by Cory Brothers & Co., Limited, for account of Messrs. Benchimol & Sobrinho, in and upon the good steamship *Boston City*, whereof is master for this present voyage, and bound for Rio de Janeiro, tons of 'Cory's Merthyr' steam coal, which are to be delivered in the like good order and condition at the aforesaid port of Rio de Janeiro (all and every the dangers and accidents of the seas and navigation of what nature or kind soever excepted) unto order or to assigns, he or they paying freight for the same and other conditions as per charterparty.

"Dated in Cardiff, 26th April, 1893.

"Thomas Clark, Master."

After the bills of lading had been signed and delivered to the charterers, who were also the shippers of the coal, the master was induced by them to sail for Buenos Ayres instead of Rio. He did so upon the assurance that the coals belonged to the charterers, and that the bills of lading would be forwarded to that port. There seems to be no doubt at all upon the evidence that a fraud was intended to be committed, and that the captain (whose good faith was not questioned) was deliberately imposed upon.

The bills of lading were indorsed by Benchimol & Sobrinho to the plaintiff company, who were bankers at Manchester, as a security for an advance of 3217*l.* 10*s.*, and were forwarded to the plaintiffs' agents at Rio, with instructions that the coal should be delivered against payment of the amount advanced. When the *Boston City* arrived at Buenos Ayres the master was informed by the representative of Benchimol & Sobrinho that the bills of lading were in his possession, and the master, without requiring the production of the documents, delivered the coals to the firm. The coals were sold, and the proceeds received by Benchimol & Sobrinho, who afterwards stopped payment; and the plaintiffs have never been paid the money advanced by them. The plaintiffs subsequently applied to the defendants for the payment of the amount they had lost by the delivery of the coals

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without the production of the bills of lading, and were met by the defence that under the charterparty made with Benchimol & Sobrinho the master was their agent, and not the agent of the owners.

It was not asserted that the plaintiffs had notice of the provisions of the charterparty, or that they were bound by any of its terms with respect to the cargo except such as concerned them as consignees: see *Serraino* v. *Campbell* (1); and it could not be disputed that the contract to be gathered from the bills of lading was altogether different from that contained in the charterparty.

But it was argued for the defendants that the terms of the charterparty transferred from them to the charterers all their obligations as owners under it, and that it was altogether immaterial whether the plaintiffs had notice of its contents or not. The charterparty, which was dated April 7, 1893, was for the most part in the ordinary form of a time charter, where possession of the ship is retained by the owners. The owners were to let the ship, with full complement of officers, seamen, engineers, and firemen, and were to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew.

The freight was to be paid monthly, and the charterers were to provide cash for disbursements as required by the master. The cargo was to be laden $\frac{\text{and}}{\text{or}}$ discharged in any dock, or at any wharf or place that charterers should direct, where the vessel could always safely lie afloat; and the whole reach of the ship was to be at the charterers' disposal, reserving proper space for ship's officers. The owners were not to be responsible for the excepted perils mentioned, and were to have a lien upon all cargoes for the charter money due under the charter.

Upon these provisions (if there were none other) it was conceded that the owners would be responsible; but the charterparty contained the following further provisions upon which the defendants relied:—

"The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under the charter. In signing bills

(1) [1891] 1 Q. B. 283.

of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences and liabilities (if any) that may arise from the captain signing bills of lading, or in otherwise complying with the same."

Now, at the time when the charterparty was signed the master was undoubtedly the agent of the owners. By his appointment he had undertaken with his owners to act with proper care and skill in the navigation of the ship, and for the due protection of those whose interests should be placed in his charge, including the owners of goods shipped under the bills of lading. He did not, in point of fact, enter into any contract with the charterers. He was handed a copy of the charter, with directions from his owners to carry it out. Nothing was done to alter his position as master of the defendants' vessel, or to exonerate him from his obligations as their agent and representative. It was argued for the defendants that under the charterparty the master had with his consent been made the agent of the charterers, and that the ownership of the vessel, with her officers and crew, was for the time being transferred to the charterers. This it was admitted could not be the effect of the charter for all purposes. It was not denied that as regards third parties, for instance, the owner of a vessel damaged in a collision due to the negligence of the master, the defendants would be liable. But it was attempted to be made out that the effect of the charter was to establish a dual control over the master; to leave him the agent of the owners for the purpose of navigation, and the agent of the charterers in respect of the carriage and delivery of the cargo. No authority was cited in support of this view, and such a construction of the charter seems to me to be unreasonable. If the captain was the captain of the defendants, the holder of the bill of lading would have a right to assume against the owner that the captain had the ordinary authority of those in his position. (See Lord Esher M.R.'s judgment in *Baumwoll Manufactur von Scheibler* v. *Gilchrest & Co.* (1)) It was pointed out for the plaintiffs, that in none of the many cases which were cited was the owner held free from responsibility where he was shewn

(1) [1892] 1 Q. B. 253, at p. 258.

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to have retained possession and control of the vessel, and reliance was specially placed on the judgments of the House of Lords in *Baumwoll Manufactur von Scheibler* v. *Furness* (1), where possession and control for the use and benefit of the owner were treated as the chief tests of liability. The defendants contended that the extent of the owners' obligations was to be gathered from the charterparty, and that the special agreement that the captain should only sign bills of lading as agent for the charterers, exonerated the shipowners from liability to the plaintiffs. But the true meaning of the clause seems to me to be that the charterers undertook as between themselves and the owners to underwrite, as it were, the risks of each voyage under the charter, and that the undertaking did not affect the rights of those who might become holders of the bills of lading in the belief that the master in signing was exercising his ordinary authority. It is obvious that a charter under which an owner, still in possession and control of his ship, was enabled to contract himself out of all liability to the holders of bills of lading or their assigns, would practically destroy the negotiable character of those instruments. In order to guard against fraud, precautions and inquiries might be necessary which would seriously embarrass ordinary mercantile transactions. The object of the shipowners in this case was no doubt to protect themselves against such claims as the present one. Their contract with the charterers, for what it was worth, afforded such a protection, but it did no more. Where an owner navigating his ship by his master and crew desires to transfer to another his obligations for the acts of his master, he should do so by an explicit statement to that effect in the bills of lading which his master signs. The mode adopted by the defendants in this case to escape from liability seems to me to be insufficient, and I give judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Addleshaw, Warburton & Trenan, for Addleshaw & Warburton, Manchester.*

Solicitors for defendants: *Downing, Holman & Co.*

(1) [1893] A. C. 8.

A. P. P. K.

RAYNER *v.* THE REDERIAKTIEBOLAGET CONDOR.

1895
June 14, 15.

Ship—Charterparty—Refusal to sign Bills of Lading—Penalty or Liquidated Damages.

A charterparty contained the clause, "The captain shall sign charterer's bills of lading as presented without qualification . . . within twenty-four hours after being loaded, or pay 10*l.* for every day's delay as and for liquidated damages until the ship is totally lost or the cargo delivered."

The captain wrongfully refused to sign the bills of lading as presented; but the charterers were unable to shew that they had sustained any damage by his conduct:—

Held, that the clause imposed a penalty and not liquidated damages, and that the plaintiffs were only entitled to nominal damages.

Jones v. *Hough* (5 Ex. D. 115) commented on.

Action tried by Mathew J. in the Commercial Court without a jury.

On August 16, 1894, the plaintiffs chartered the defendants' steamship *Ornen* to proceed to Grimsby and load a cargo of coal, and being so loaded to proceed forthwith to Cronstadt and deliver the same.

The charterparty contained (inter alia) the following provision: "The captain shall sign charterer's bills of lading as presented without qualification, except by adding weight unknown, within twenty-four hours after being loaded, or pay 10*l.* for every day's delay as and for liquidated damages until the ship is totally lost or the cargo delivered."

The *Ornen* arrived at Grimsby on August 27, and the loading was completed by September 10. On that day bills of lading without qualification were presented to the captain, but he refused to sign them. A dispute had arisen as to the date of the notice of the *Ornen's* readiness to load and as to the amount of the demurrage payable by the plaintiffs, and the captain insisted on inserting in the bills of lading the following words, "Together with demurrage, protests, and consular expenses, as per margin, 204*l.*, to be paid at the port of discharge before breaking bulk," and he signed bills of lading under protest in this modified form on September 10, and sent them by post to the plaintiffs.

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The *Ornen* arrived at Cronstadt on September 21. The captain refused delivery of the cargo until he had obtained this sum of 204*l.* from the plaintiffs. They, therefore, paid it under protest, and the cargo was delivered on September 24. They now claimed (in addition to the return of the sum of 204*l.*) 10*l.* per diem as liquidated damages under the charterparty from September 10 to September 24. No evidence was given of any damage having actually been sustained by them in consequence of the refusal of the captain to sign the bills of lading as presented to him.

Joseph Walton, Q.C., and *A. D. Bateson*, for the plaintiffs. There is no reason why the clause should not be given its literal significance. In *Jones* v. *Hough* (1), in which a very similar clause was held to impose a penalty and not liquidated damages, Bramwell L.J. said that the reason of the decision was that there was no terminus ad quem to the penalties imposed, that they were still going on, and that there was nothing to shew when they were to stop. Here the damages ceased to become payable on delivery of cargo. That is an express terminus ad quem, and distinguishes the case from *Jones* v. *Hough*. (1) The Court has to discover the meaning of the parties. Here damages were fixed for a specific breach of the charter—the refusal of the captain to sign bills of lading as presented without qualification. That breach has occurred, and the damages fixed have therefore become payable.

Witt, Q.C., and *T. E. Scrutton*, for the defendants. The case is indistinguishable from *Jones* v. *Hough*. (1) The fact that there was there no terminus ad quem could not have been the ratio decidendi of that case. The bill of lading would come to an end when the cargo was discharged, and the penalties could not run on any longer; but where a sum of money is fixed to be payable under circumstances which may give rise either to serious or to trivial damages, it is a penalty and not liquidated damages. That is the principle laid down in all the cases: *Wallis* v. *Smith* (2); *Sparrow* v. *Paris*. (3)

(1) 5 Ex D. 115. (2) 2 Ch. D. 243.
(3) 31 L. J. (Ex.) 137.

MATHEW J. (after stating the facts and deciding, on the evidence, that the plaintiffs were entitled to a return of part of the sum paid by them under protest at Cronstadt, continued):— Then there remains another claim of the plaintiffs. They assert that under this charterparty they are entitled to liquidated damages for every day during which the bill of lading was not delivered to them by the captain duly signed. Now what occurred was this: The bill of lading was taken to the captain; it was without qualification of any sort; it contained nothing on the face of it except what was provided for by the charterparty, "Except by adding weight unknown." The captain declined to sign that bill of lading, and insisted upon adding to the clause, "Unto order on being paid freight and all other conditions as per charterparty," the words "together with demurrage, protests, and consular expenses, as per margin, 20*l.*, to be paid at port of discharge before breaking bulk." The captain in point of fact determined for himself, and determined, as it now turns out inaccurately, in his judicial capacity what was the amount of the demurrage and charges that the consignee would have to pay, and he insisted on inserting that amount in the bills of lading. Naturally enough, the plaintiffs protested against those figures, and, as I have shewn, they were well warranted in so doing. The captain refused to sign bills of lading in any other form. He inserted the words under protest and signed bills of lading in this form on September 10.

Now it is said that on the terms of the charter the captain was bound to sign the bills of lading as presented, without qualification except by adding "weight unknown," within twenty-four hours after the ship was loaded, and that, having failed to do so, the following clause applies, "Or pay 10*l.* for every day's delay as and for liquidated damages until the ship is totally lost or the cargo delivered." A claim is made for that 10*l.* a day amounting to the sum of 140*l.*

The question at once presents itself whether that amount could be recovered as liquidated damages, or whether the clause imposes a penalty, and a penalty only, inasmuch as it is to be taken that the plaintiffs are not in a position to prove that they

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sustained any loss whatever, or that in point of fact any damage was done them by reason of the conduct of the captain.

It certainly is a startling proposition that by reason of the clause inserted in the charter they are to be paid the large sum of 140*l.* when they have sustained no loss.

My attention was called to the case of *Jones* v. *Hough*. (1) The only difference from the clause there inserted in the charterparty and the clause now under consideration was that the words "until the ship is totally lost or the cargo delivered" were not inserted in the charterparty in *Jones* v. *Hough*. (1) It is contended that the insertion of those words distinguishes the present case from *Jones* v. *Hough*. (1) In that case it was held that the clause imposed a penalty only. That was the view taken by Lindley J., who tried the case, and on appeal that view was affirmed by Cockburn C.J. and Bramwell, Cotton, and Thesiger L.JJ., and it was held that the clause only entitled the shipowners to the actual damages that they had sustained, and not to the amount fixed by the clause. The only member of the Court of Appeal who gave reasons for his decision on this point was Lord Bramwell, who pointed out that the clause before him gave no terminus ad quem—prescribed no limit after which the amount fixed by the clause should cease to be payable. The literal construction of the clause would therefore be, he said, to create an annuity in favour of the shipowners for the amount of the penalty which would run on indefinitely. With the greatest deference, that reasoning does not appear to me to be entirely satisfactory. In the present case, however, the clause contains a definite terminus ad quem, because the penalty is only payable "until the ship is totally lost or the cargo delivered." It is contended that those words have been inserted in order to convert what would otherwise be a penalty (as decided in *Jones* v. *Hough* (1)) into liquidated damages. It seems to me that Lord Bramwell was not really giving the ratio decidendi when he spoke of the penalties going on till the end of time. The real reason for his decision seems to me to be contained in the words, which are applicable to this case, and in which I must

(1) 5 Ex. D. 115.

take it the other members of the Court acquiesced: "The penalties only accrue where there has been a delivery of bills of lading after a delay, and they do not accrue where there has been an entire refusal to give any bill of lading." (1)

In the present case the bills of lading which the captain signed were not what he had undertaken to sign. It was not a case of mere delay.

No doubt the event contemplated by the clause was the refusal of the captain to sign the bills of lading as presented to him; but much may be said for the view that the amount fixed covered a multitude of transgressions, since the qualification which the captain desired to introduce might be insignificant, and in such a case it would seem a strong conclusion to hold that it was intended that the amount should be paid for every day during which the dispute over the insignificant qualification lasted, and that if the charterer chose to refuse to acquiesce in it, and the captain sailed without signing the bills of lading, the amount would run on for the whole period of the voyage.

I have come to the conclusion that the clause imposes a penalty and not liquidated damages, and therefore that the plaintiffs in respect of that part of their claim are only entitled to nominal damages. There will be judgment for the plaintiffs for the other amount I have mentioned.

Judgment accordingly.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Yates, Johnson & Leach, Liverpool.*

Solicitors for defendants: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

(1) 5 Ex. D. 115, at p. 123.

A. P. P. K.

C. A.
1895
June 15.

[IN THE COURT OF APPEAL.]

PETERSEN *v.* FREEBODY & CO.

Ship—Charterparty—Discharge—Delivery of Spars and Poles—Consignees' Obligation in taking Delivery.

A charterparty for the carriage of spars from a port in Norway to London provided that the cargo should be discharged in the Surrey Commercial Docks, the discharging to take place in eight days, the cargo to be taken from alongside at merchants' risk and expense, the ship "to discharge over side in the river or dock into lighters or otherwise if required by consignees":—

Held, that the charterparty did not impose upon the ship's master and crew the obligation to get the spars outside the ship and into the lighters, and for that purpose to put men on board the lighters; but that when they had brought the spars within reach of the consignees' men in the lighters, it was the duty of the latter to take their part in the joint operation of delivering and receiving the goods, and that the consignees were liable to pay demurrage for delay caused by reason of their men in the lighters being too few to enable the discharge to be completed within the lay-days.

Appeal from the judgment of Kennedy J. at the trial of an action without a jury.

Action for demurrage, brought by the owner of the ship *Magdalene* against consignees of cargo. The ship was chartered by a merchant of Christiania to load there a cargo of spars and poles to be carried to and discharged at the Surrey Commercial Docks in the port of London.

The charterparty contained (inter alia) the following provisions with respect to the discharge of cargo: "The discharging to take place in eight days or quicker if possible. Receiver of cargo to have the option of keeping the vessel five running days on demurrage at the rate of 4*d.* per register ton per day. Lay-days to commence on ship being ready for loading or discharging, provided that the captain has given notice twenty-four hours in advance and vessel being reported at Customs. The cargo to be brought to and taken from alongside the ship at merchants' risk and expense. The ship to deliver the cargo with such dispatch that unnecessary delay can be avoided. The

ship to discharge over side in the river or dock into lighters or otherwise if required by consignees. The usual custom of the wood trade of each port to be observed by each party in cases where not specially expressed."

The bills of lading were indorsed to the defendants as consignees of the cargo, subject to the conditions of the charterparty. The ship arrived at the Surrey Commercial Docks, and commenced to discharge her cargo. The spars above a certain thickness were discharged into the water direct, and then rafted and taken away. The thinner spars and poles, which were of lengths varying from twenty to forty feet, were put into lighters in the following way: They were lifted with a tackle from their place in the hold by the ship's crew, and pushed by the crew through a port. A small stage was put against the ship's side outside the port, and the lighter was brought end on close to the stage. The lighter stood higher than the port, and one of the ship's crew stood on the stage and guided the spar or pole as it came through the port to the men on the lighter, who assisted it down into the lighter. There was evidence that the defendants sent at first one man, and then two men, with each lighter; that the master of the ship complained from time to time that the men sent with the lighters were insufficient to enable the discharge to be completed within the lay-days, and that he put two, and sometimes three, of the ship's crew on the lighters to help the consignees' men. The cargo was not discharged until the lay-days had been exceeded by about eight days, and there was evidence that the delay and detention of the ship during those additional days was caused by the insufficient number of men sent by the defendants with the lighters.

Kennedy J. gave judgment for the plaintiff for the demurrage claimed, and the defendants appealed.

Joseph Walton, Q.C., and *Scrutton*, for the defendants. The shipowner's obligation under the charterparty was to discharge "over side into lighters." The ship's crew were, therefore, bound to complete the operation of putting the spars and poles into the bottom of the lighter, and the master should have placed sufficient men on the lighter to enable the delivery to be made within the

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lay-days. The evidence shews that he did place two or three men on the lighter; but they were not sufficient. The consignees' men in the lighter were only there for the purpose of stowing the spars and poles. There was evidence that no more than two men were ever sent with a lighter, and that is some evidence of a custom for the ship to deliver in the way contended for. At any rate, the master and crew were bound to get the goods clear of the ship's side. The delay in delivering the cargo was caused by their default.

Robson, Q.C. (*Carver* with him), for the plaintiff. The master was not bound to put any of his men off the ship. When a spar or pole had been pushed through the port and over the stage so as to be within the reach of the consignees' men in the lighter, it was their duty to take part in the operation, and the evidence shews that the delay occurred through there not being enough men on the lighters to take delivery as fast as the spars were brought within their reach. In putting his own men on the lighter the master did more than he need. The clause in the charterparty, "to discharge over side in the river or dock into lighters or otherwise if required by consignees," is clearly only intended to give the consignees an option to take delivery by lighters or in some other manner.

LORD ESHER M.R. In this case the plaintiff, a shipowner, has brought an action against the consignees of cargo shipped under a charterparty for demurrage which he alleges to have been caused by the delay of the defendants in the operation of discharging the cargo in the Surrey Commercial Docks. By the terms of the charterparty the discharging was to take place within eight days. The actual discharging took more than that time; and the question in the case is—whose fault was it? If it was the fault of the shipowner, he clearly cannot claim demurrage against the charterer or his consignees, the defendants. If it was not the shipowner's fault, the consignees are bound to pay demurrage. The charterparty provides, "The discharging to take place in eight days," and "the cargo to be brought to and taken from alongside the ship at merchants' risk and expense; the ship to deliver the cargo with such dispatch

that unnecessary delay can be avoided"—so that at one place this operation is described as "the discharging," and at another as "delivery"—and "to discharge over side in the river or dock into lighters or otherwise if required by consignees." The operation, therefore, which is to take eight days is an operation to be performed as between the shipowner and the consignees. Whichever word be used, whether it be called a "discharging" or a "delivery," and whatever be the circumstances of the delivery, one party is to give, and the other is to take, delivery at one and the same time, and by one and the same operation. It follows that both must be present to take their parts in that operation. Those parts are, the ship has to deliver and the consignee to take delivery—where? Each has to act within his own department. The shipowner acts from the deck or some part of his own ship, but always on board his ship. The consignee's place is alongside the ship where the thing is to be delivered to him. If the delivery is to be on to another ship, he must be on that ship; if into a barge or lighter, on that barge or lighter; if on to the quay, on the quay. Wherever the delivery is to be, the shipowner, on the one hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery: that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, and does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship; but I think he must do something more—he must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them; but the moment the goods are put within the reach of the consignee he must take his part in the operation. At one moment of time the shipowner and the consignee are both acting—the one in giving and the other in taking delivery; at another moment the joint act is finished. Where goods are slung, and lowered gradually over the side of the ship into a lighter, they cannot all be deposited on the same spot in the same lighter. It is obvious, therefore, that those on board must help in the operation of

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taking delivery by guiding the thing as it is coming down into the lighter.

In the present case the delivery was of spars; but it was still a joint operation in which each party had to take his part. The shipowner had to get the spars in such a position as that they could be taken out of the ship. He had not completed his part of the operation by merely getting the spar on to the stage; but, when one end of the spar was tipped over the side of the stage so as to come within the reach of the men in the lighter, they had to take their part in the ordinary operation in the ordinary way: they had to assist in getting the spars into the lighter. No custom of the port with respect to the delivery of spars and poles was proved. It was said that, if the consignees' duty was such as I have described, it could not be performed by two men only, and that the evidence shewed that no more than two men were ever sent with a lighter. Whether the duty can be performed by two men, however, depends upon the number of the days in which the operation has to be performed. The consignee must supply enough men to complete the operation within the lay-days; and if two men are not enough, he must supply more. Here the evidence shewed that at one time there was only one man, and afterwards there were two men, sent with the lighters, and that the delivery was delayed beyond the lay-days because the consignees did not send enough men. The captain complained, and then he did what he was not bound to do—he put some of his own men on to the lighters in order to help to do the work which it was the duty of the consignees to do. By so doing, no doubt, he saved additional demurrage; but it is now contended that he was bound to put his own men on to the lighters, because his duty was to complete the whole operation of getting the spars out of the ship and delivering them into the lighters. I am of opinion that on the true construction of the charterparty it was not his duty. The delivery, under the charterparty, was to be a delivery in the ordinary way by a joint operation in which each was to take his part. The lay-days were exceeded because the consignees had not sufficient men on the lighters to perform their part in that operation. The ship was not in default; and, therefore,

the shipowner is entitled to demurrage. This appeal should be dismissed.

KAY L.J. I am of the same opinion. The consignees rely upon the clause in the charterparty which provides that the ship is "to discharge over side in the river or dock into lighters or otherwise if required by consignees," and they regard the duty imposed upon the shipowner as not completed until he has discharged, not merely over side, but has put the spars into the lighters. I do not think that the words of the clause impose such a duty upon the shipowner. I think that his duty is completed when he has discharged over side and put the spar under the dominion and control of the men in the lighter. The words "into lighters or otherwise" clearly refer only to the consignees' option to take delivery by lighters or in some other way. I agree entirely with what the Master of the Rolls has said as to the duty of the shipowner and of the consignee in respect to the delivery of cargo, and I do not desire to add anything on that point. The question is, by whose default did the delay in this case take place? There was a conflict of evidence. I think that the fact that part of the ship's crew had to be put on the lighters to assist the lightermen in receiving the spars is decisive, and that there was quite sufficient evidence to justify the conclusions of fact which the learned judge who tried the case arrived at. [The Lord Justice referred to the evidence.] I am therefore of opinion that this appeal should be dismissed.

A. L. SMITH L.J. I am of the same opinion. The charterparty in this case is one of an ordinary description: there is nothing exceptional or peculiar in it. The shipowner's complaint is, "You, the consignees, detained my ship beyond the days specified in the contract," and primâ facie he is entitled to demurrage unless the delay can be shewn to have occurred through his own fault. The consignees' answer is, "It was your fault; you had not men enough to deliver the cargo within the lay-days." The reply is, "I had; but you did not supply men enough to take delivery, and I had to put my own men on board the lighters to help yours." The question is whether the

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shipowner's duty was to place the spars in the bottom of the lighters, and whether, until that had been done, the consignees were not bound to accept delivery. It is familiar knowledge that in ordinary cases of discharging cargo the ship's crew does the work until the goods are over the rail, and then the receiver takes his part in the operation. As has been pointed out by the Master of the Rolls, the giving and taking delivery is a joint operation. It is contended here, that because the cargo was a cargo of spars the consignees had not to receive the spars until the ship's crew had put them into the bottom of the lighter. If that be so, the case forms an exception to the general rule. But what is there to shew that there is any duty on the shipowner to do that which he is not bound to do with respect to any other cargo, namely, to put his crew off the ship and on to the lighter? There was no evidence of any custom to that effect. When asked to point out any such evidence, counsel for the appellants could only say that two men were always sent with the lighters; but that might be because two men were sufficient to take delivery within the lay-days. I think the defendants have failed in establishing that in unloading a cargo of spars any different rule is applicable than applies to any other cargo.

Appeal dismissed.

Solicitors for defendants: *Trinder & Capron.*
Solicitors for plaintiff: *Stokes, Saunders & Stokes.*

W. A.

[IN THE COURT OF APPEAL.]

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May 30.

BAERSELMAN *v.* BAILEY AND OTHERS.

Ship—Bill of Lading—Exemption of Shipowner from Liability—Negligence of Servants—"In navigating the Ship or otherwise."

A bill of lading contained, among other exemptions, one by which the shipowner was not to be liable for "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship, or otherwise." A part of the cargo was damaged by being negligently stowed by a stevedore employed by the shipowner. In an action by the owner of the cargo so damaged:—

Held, reversing the judgment of the Divisional Court, that the shipowner was not liable, for the words "or otherwise" in the bill of lading were general, and did not limit the exemption to loss or damage arising from negligence in matters akin to navigation, or to loss or damage arising from negligence in relation to the other excepted perils of the bill of lading.

Norman v. *Binnington* (25 Q. B. D. 475) considered.

APPEAL by the defendants from a judgment of the Divisional Court on a question of law raised on the pleadings.

The action was brought by the plaintiff in respect of damage to eggs loaded in Russia on the defendants' vessel for delivery in London. The bill of lading exempted the shipowner from liability in respect of certain excepted perils, and also contained a clause that the shipowner was not to be liable for "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship, or otherwise." The eggs were said to have been spoiled by being improperly loaded near some hay, and the loading was done by a stevedore employed by the defendants. The question before the Divisional Court (Cave and Lawrance JJ.) was, assuming the damage to have been caused by the negligence of the defendants' servants, what meaning was to be attached to the words "or otherwise" in the exceptions. The Court gave judgment for the plaintiff on the authority of *Norman* v. *Binnington*. (1)

The defendants appealed.

(1) 25 Q. B. D. 475.

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1895. May 7. *Bucknill, Q.C.*, and *T. F. D. Miller*, for the defendants. The exception applies to the negligent acts of the shipowner's servants whether they occur in the course of navigating the ship or not. The language in this bill of lading is not the same as that on which *Norman* v. *Binnington* (1) was decided, as there is no list of exceptions following after the words "or otherwise," and there is no reason for limiting those words to excepted perils as suggested by A. L. Smith J. in that case. [They cited also *The Duero* (2), and *Hayn* v. *Culliford.* (3)]

Joseph Walton, and *Hugh F. Boyd*, for the plaintiff. The words "or otherwise" cannot be construed so widely as the plaintiff seeks to construe them. They either refer to matters akin to navigation, or else they must be read, as in *Norman* v. *Binnington* (1), as referring only to the other excepted perils of the bill of lading.

Cur. adv. vult.

1895. May 30. LORD ESHER M.R. In this case the parties have agreed to take the opinion of the Court on a point which, if it is decided in a particular way, will determine the dispute between them.

The question arises in this way: Eggs were shipped in Russia to be brought to England, and the loading was done by a stevedore employed by the shipowner. For the purposes of this case we are to assume that he mis-stowed the eggs by putting them into too close contact with some hay, and we are also to assume that this was the cause of the injury to the eggs which is complained of. The point of law which we have to decide is whether the shipowner is relieved from liability by the terms of the bill of lading. This must be determined by ascertaining whether the stevedore was the servant of the shipowner, and, if so, whether the negligence of which he has been guilty is within the exception of the bill of lading. The goods under the bill of lading are to be delivered in good order and well conditioned, as shipped, and if that stood alone the shipowner would be liable. But

(1) 25 Q. B. D. 475. (2) L. R. 2 A. & E. 393.
(3) 3 C. P. D. 410; 4 C. P. D. 182.

there are exceptions which may relieve him from liability, for he is not to be liable "for any consequences or any accidents of navigation, &c., nor for any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship, or otherwise."

The assumed negligence of the stevedore was in disposing of the loading of the cargo before the ship sailed, and consequently does not arise under the exceptions relating to negligence in navigation; but the question is whether it comes within the clause under the final words "or otherwise." The captain need not have employed a stevedore, though he was entitled to do so: but, under the circumstances, I think it must be taken that the stevedore was a servant of the shipowner. In the exception we do not find words of a class followed by general words. The general words do not indicate something resembling negligence in navigation; but to my mind they indicate something beyond and different to that, so that the clause relates to negligence in navigating the ship, and in matters other than navigating it, and the question is not one of putting a limitation on the general words, but of reading them in their ordinary sense. Cave J. decided this case on the ground that he was bound by *Norman* v. *Binnington* (1), and he has explained that though he concurred in the judgment of that case at the time, he is not prepared to say that he now agrees with it. There is one part of the judgment in *Norman* v. *Binnington* (1) with which I cannot agree, and that is the last part, for with all that precedes I entirely agree, and I only disagree with a part of the judgment which does not seem to me to have been necessary for the decision. I do not intend, therefore, to overrule that case, but only to express my dissent from one part of it. In the judgment it is said, on p. 479: "To read the words 'or otherwise' as meaning akin to navigating the ship is to give no meaning, in my judgment, to the preceding words 'in navigating the ship.' . . . To read the words 'or otherwise' as including everything besides navigating the ship is to render the words 'in navigating the ship' inoperative; but to read the words, 'whether in navigating the ship or otherwise,' as meaning an absolution from

(1) 25 Q. B. D. 475.

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liability to damage brought about whether in negligently navigating the ship, or in negligently bringing about those other losses or damages from which the shipowner has exempted himself in the bill of lading, is, in my judgment, the true reading of this bill of lading."

The truth is that if this bill of lading is to be read as absolving the shipowner from the negligence of his servants in other respects than in navigating the ship, there are many cases left in which the shipowner would be liable and to which the exception would not apply. For instance, in the case of the ship being unseaworthy without any negligence of servants of the shipowner and the cargo being damaged, he would be liable. Another example would be the express order of the shipowner that the ship should deviate on her voyage and injury to the cargo through the deviation, or a neglect by the shipowner to provide something which he was bound to provide for the purpose of carrying the cargo, as, for instance, dunnage, which his agent or correspondent, who could not be called in any sense a servant, refused to provide. In such cases and many others, if the cargo were injured the shipowner would be liable. Reading the exceptions in the bill of lading as widely as it is possible to read them, they still only exonerate the shipowner from the consequences of the negligence of his servants. I can see no mischief that is done by allowing him to make this stipulation if the other party accepts the bill of lading, and so absolves him. I do not differ from the judgment in *Norman* v. *Binnington* (1); but in this case I think that the shipowner has by the ordinary grammatical construction of the language used absolved himself from liability. The appeal should therefore be allowed.

RIGBY L.J. I am of the same opinion. During the argument I was disposed to put the limited construction upon the words "or otherwise" which is suggested in the latter part of the judgment of the Court in *Norman* v. *Binnington* (1), probably because I did not recognise how much liability would remain if the wider construction is adopted. I may say that I have

(1) 25 Q. B. D. 475.

read carefully the judgment referred to, and I am entirely in agreement with the reasoning in the earlier part of it. Unquestionably, if in a clause in a bill of lading exempting a shipowner from liability there is an ambiguity, the document must be construed in favour of the shipper. That rule has no application where the document is free from ambiguity. We know what the history of these limitations has been. At first the shipowner was freed from liability for the consequences of the negligence of the master and mariners in navigating the ship. Then the exemption from liability was applied to acts of the other servants, which would include stevedores employed by the captain to stow the cargo, and then the words "or otherwise" were added to the clause. It seems to me that there is no ground for imputing ambiguity to these words, which must therefore be construed according to their ordinary meaning. The clause exonerates the shipowner from liability for the negligence of his servants, whether in navigating the ship or not. In this view of the case the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *R. Greening.*
Solicitors for defendants: *Downing, Holman & Co.*

A. M.

1895
June 21, 22, 27; *July* 6.

CLUTTON & CO. *v.* ATTENBOROUGH.

Cheque—"Fictitious or non-existing Person"—Ignorance of Drawer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3; *s.* 73.

A clerk of the plaintiffs, by fraudulently representing to them that work had been done on their account by B., induced them from time to time to draw cheques payable to the order of B. in payment of the pretended work. There was, in fact, no such person as B., nor had any such work as was represented been done on the plaintiffs' account. The clerk forged B.'s indorsement to the cheques, and negotiated them with the defendant, who gave value for them in good faith. The cheques were duly honoured by the plaintiffs' bankers. The plaintiffs, having subsequently discovered the fraud, sought to recover from the defendant the amount of the cheques as money paid under a mistake of fact:—

Held, that B. was not the less a "fictitious or non-existing person" within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, because at the time of drawing the cheques the plaintiffs supposed him to be a real person; that consequently the cheques were to be treated as payable to bearer, and the plaintiffs could not recover.

Action tried before Wills J. without a jury.

The plaintiffs are land agents, and amongst many estates manage those of the Ecclesiastical Commissioners, with whom their transactions amount to as much as 700,000*l.* a year. One of the plaintiffs' clerks, named John Piper, managed to carry on a system of fraud in their office by which, in the course of eight years, he obtained cheques, 640 in number and in value amounting to some 18,000*l.*, drawn by the plaintiffs to the order of non-existing persons for work never executed, and for goods which were never supplied. These cheques he stole and indorsed in the name of the non-existing payee. The whole of these cheques were in due course cashed by the plaintiffs' bankers and allowed in account by the Ecclesiastical Commissioners. Ninety-seven of them, of the value of 3558*l.* 13*s.* 2*d.*, were, between March 1, 1887, and January 9, 1894, paid by Piper to the defendant, who is a pawnbroker and jeweller carrying on business in Fleet Street, and who gave value for them. The plaintiffs claimed to recover the proceeds of these cheques, which were paid over by their bankers to those of the defendant, as money paid by

them under a mistake of fact, and which, therefore, the defendant had no right to retain. The course of business at the plaintiffs' office which rendered the commission of this fraud possible was as follows: All letters received at the plaintiffs' office were opened by a secretary. When he thus received an account for work done or goods supplied for an estate which they managed, he passed it on to the account department, where it was received and sent on for verification to the management department. It was there examined by the person who looked after that particular estate, and, if found in order, initialled by him and taken back to the account department, where a certificate of the nature and amount of the bill, together with the name of the estate to which it was charged, was prepared by a clerk and initialled by the head of the department. This certificate was then laid before the cashier, who drew out a cheque accordingly, payable to order, which was then submitted with the certificate to one of the principals, who signed it. The signed cheque was then sent back to the account department, together with the certificate, whence it was, with the bill, posted to the payee. The day's certificates were handed to the head of the account department, and, when the receipted account came back from the customer, it was, together with its corresponding certificate, placed amongst the vouchers relating to the same estate. In the meantime it would lie upon the table of the head of the account department, and be accessible to the persons employed in that department. Once a year—in the case of the Ecclesiastical Commissioners—the books were made up and an account struck, the various payments being entered "as per voucher, No. 2349"—or whatever the number might be—and the account and vouchers were put in order for audit. Piper was a clerk in the account department, and was the clerk who arranged and checked the vouchers for the annual audit. He must have made a careful study of the weak points, both of the plaintiffs' system and of the manner in which it was carried out. He had observed that an account on first passing through the account department, on its way to the management department, was not recorded, and that, after it had been verified and initialled in the latter department, neither it nor the cheque drawn against it ever passed

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back into the management department, nor was the receipted account, when returned, taken into that department. He must have observed, also, that the certificate, which was prepared in the account department and initialled by the chief clerk therein, was never compared with the account, and that the principal who signed the cheques had no personal knowledge of the persons who were employed to do work on the numerous estates of the Ecclesiastical Commissioners, nor even of their names. He must have observed, also, that, when the certificate and cheque were returned to the account department, it was possible for him to obtain possession of them without being detected, and that the certificates were so kept that he could get at them and abstract at pleasure any particular one that it was necessary for him to withdraw from observation; and further, that as the receipted account never went back to the management department, and its passage before payment through the account department was never recorded, the fact that no receipt ever came to hand in respect of any supposed account for which a cheque had been drawn would escape notice. It appeared to be nobody's business to see that there was a voucher for money paid; and he was, in fact, able to possess himself of the proceeds of 640 cheques for which no accounts had, in fact, ever been rendered, and no receipts either taken or received. He simply forged the certificate for the cashier, and subsequently stole the cheques and their corresponding certificates from the account department, and disposed of the cheques, in the present case, to the defendant. Piper would, however, necessarily have been detected if he had not been able to satisfy the audit of the Ecclesiastical Commissioners; so he forged a voucher corresponding with the amount of each cheque, consisting of a bill supposed to be rendered by a tradesman or workman, real or fictitious, to a real tenant of one of the estates of the Ecclesiastical Commissioners for work supposed to have been done on that estate. These he put amongst the genuine vouchers, and when the audit was at hand he numbered them with their proper numbers. In the accounts rendered to the Ecclesiastical Commissioners the payments were numbered and described as being "as per voucher No. 'so and so.'" It was not proved, but it was a neces-

sary element in the successful fraud, and must have been the fact that the numbers of the vouchers were inserted in the account to be rendered to the Ecclesiastical Commissioners either by Piper himself, or by some one who took them from the vouchers themselves after Piper had placed them in order and duly numbered them, and who knew nothing of the business of the estates. There was thus in the audit no comparison of the vouchers with the cheques or certificates. Most of the forged certificates were upon the discovery of the frauds and the arrest of Piper found in Piper's house, and there was no necessary correspondence either as to the subject-matter of the supposed transaction or as to the name of the person supposed to be entitled to payment, or in short in anything save amount, between the certificate and the forged voucher for the same sum. The name selected by Piper for the payee of the cheques with which this action was concerned was "George Brett." He forged certificates of the kind described, of which the following may be given as an example.: "Timber account, Frindsbury, &c.—Pay Mr. George Brett, planting Norway maple, 35*l.* 17*s.* (under E.C. authority). J. F.—3-3-90." The initials "J. F." meant "James Frewer," the head of the account department. At the trial Mr. Frewer was not called; but it was stated and accepted that he would not have been able to say whether these initials were in his handwriting or forgeries; so that it is clear that the only person who checked the certificates knew nothing about the estate or the work done. No planting was in fact done at Frindsbury Farm, and no authority was ever given for it by the Ecclesiastical Commissioners. When the time came for preparing for the audit the voucher which Piper forged was as follows: "Ecclesiastical Commissioners to George Brett, February 12, 1890.—6500 larch plants at 6*s.* 6*d.* a hundred—21*l.* 2*s.* 6*d.*; five men and boys making holes for same and planting as agreed for—10*l.* 4*s.* 6*d.*; nine loads best manure, 10*s.*, 4*l.* 10.—total, 35*l.* 17*s.* Settled (1*d.* stamp), George Brett. March 6, 1890." It was indorsed "Lady Day, 1890, account voucher No. 3349." Here, as in many other instances, "George Brett's" name was used in the voucher. The defendant carried on business in partnership with his father up to 1892, his father managing their principal pawnbroking establishment in the

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Strand, and the defendant managing the branch establishment in Fleet Street. On the death of his father in 1892 the defendant became the sole owner and manager of the business. From 1883 or 1884 Piper had pledged goods in the ordinary way at one or other of the defendant's places of business, and with the defendant and his father he had never used any other name than that of "George Brett." In February, 1887, he first pledged goods at the Fleet Street establishment, and in March, 1887, the ninety-seven transactions began which resulted in this action. At that date Piper owed money upon a watch, a ring, and some race-glasses which he had previously pawned with the defendant's firm. He had then brought the first of these cheques, crossed and payable to order of "George Brett" for 21*l.* 10*s.*, and asked to have it cleared; and upon the proceeds being realized he had redeemed some of his goods, paying off the interest due, bought some small trinkets, and received the balance in cash. The redemption of the goods, however, seems on that occasion to have been more apparent than real, as the more valuable articles were repledged, so that he really received the greater part of that cheque in money. Similar transactions took place on every one of the ninety-seven occasions on which the cheques in question—all crossed cheques—were handed by Piper to the defendants. Articles of large and small value were systematically bought, and at times articles of great value—a chronometer of the value of 97*l.*, for instance. The larger items were paid for by instalments, the smaller on the spot; at the same time fresh articles were pledged or articles nominally redeemed were repledged, and the cash balance was handed over to Piper. The real result of these transactions was that goods were bought during the seven years of the aggregate value of 779*l.* 19*s.* 9*d.*, principal was paid off to the amount of 439*l.* 10*s.*, and interest 100*l.* 15*s.* 2*d.*, and cash was paid over to Piper to the amount of 2238*l.* 8*s.* 3*d.*, making altogether the 3558*l.* 13*s.* 2*d.* now sued for.

In February, 1894, the plaintiffs discovered the frauds, and Piper was arrested and prosecuted to conviction.

On June 6, 1894, this action was commenced, and although the claim was for the amount of the whole of the cheques negotiated with the defendant, it was conceded that as to sixteen

cheques, amounting in all to 385*l.*, which were paid by the plaintiffs' bankers prior to June, 1888, the plaintiffs' claim was statute-barred.

Sir E. Clarke, Q.C., *Finlay*, Q.C., and *Macaskie*, for the defendant. The plaintiffs cannot recover the money back, for the defendant had a good title to the cheques and could have enforced payment of them by the plaintiffs. The payee Brett being a fictitious person, the cheques may be treated as payable to bearer by virtue of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, for by s. 73 the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. The defendant took the cheques for value and in good faith; and therefore, even if it were the fact that he took them negligently, that fact would be immaterial: see s. 90. There was no obligation on him to make inquiry: per Lord Herschell in *London Joint Stock Bank* v. *Simmons*. (1) Secondly, even if the payee was not a fictitious or non-existing person within the meaning of the Act, and the cheques were consequently not negotiable instruments, still the plaintiffs cannot recover the money back; for the mistake of fact which is sufficient to enable a person who has paid money to recover it back must be a mistake as between the person paying and the person receiving the money, and as to some fact affecting the right of the payee to receive it: Smith's Leading Cases, 9th ed. vol. 2, p. 462. As was said by Williams J. in *Chambers* v. *Miller* (2), "You cannot recover money back because you have paid it in ignorance of some fact which, had you known it, would have influenced you not to pay it; that fact being one with which the payee has nothing to do." Here the plaintiffs paid the money because they believed the work had really been done; but that was a matter with which the defendant had nothing to do. Thirdly, the plaintiffs are precluded from recovery by reason of their own negligence, which was the cause of the mistake. If they had taken the trouble to inquire whether the work had been done in any one of the cases in respect of which the cheques were drawn the whole fraud would have been discovered.

(1) [1892] A. C. 201.

(2) 32 L. J. (C.P.) at p. 33.

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Sir R. Webster, Q.C., *Tindal Atkinson, Q.C.*, and *Meek*, for the plaintiffs. These cheques were not negotiable. Not as payable to order, for there was no one who could indorse; nor as payable to bearer, for the payee was not a fictitious person within the meaning of s. 7. A payee is only fictitious within that section when he is intended to be so by the drawer. If the drawer knows that he is fictitious or non-existing, then the fact that the acceptor does not know it will be immaterial: *Bank of England* v. *Vagliano Brothers*. (1) But that case does not decide that the fact of the drawer believing the payee to be a real person is immaterial. Sect. 55, which provides that "The drawer of a bill by drawing it is precluded from denying to a holder in due course the existence of the payee," implies that the estoppel is only to arise where the drawer knew the payee to be fictitious. Secondly, the mistake under which the money was paid was one common to both parties, namely, the innocent misrepresentation of the defendant that the indorsements were valid, whereby the bankers paid it. The dictum of Williams J. in *Chambers* v. *Miller* (2) was only obiter; the question before the Court in that case was whether an assault could be justified. Thirdly, the negligence of the plaintiffs, if any, will not disentitle them to recover, for it was not the proximate cause of the loss. The proximate cause was the forgery of Piper: *Scholfield* v. *Earl of Londesborough*. (3) Mere laxity in business, however great is not sufficient to create an estoppel: *Arnold* v. *Cheque Bank*. (4)

Sir E. Clarke, Q.C., in reply. Even in the case of a bill of exchange, where the payee is in fact fictitious, s. 7 applies just as much where the drawer is ignorant of that fact as where the acceptor is ignorant of it. But further, this is a case of a cheque, not of a bill, and the drawer of a cheque, being the party primarily liable, corresponds to the acceptor of a bill.

Cur. adv. vult.

July 6. WILLS J. (after stating the facts as above set out, proceeded as follows):—

By the Bills of Exchange Act, 1882, s. 7, sub-s. 3, "Where

(1) [1891] A. C. 107.
(2) 32 L. J. (C.P.) at p. 33.
(3) [1895] 1 Q. B. 536.
(4) 1 C. P. D. 578.

the payee is a fictitious or non-existing person the bill may be treated as payable to bearer"; and by s. 73 "a cheque is a bill of exchange drawn on a banker payable on demand," and "the provisions of the Act applicable to a bill payable on demand apply to a cheque." In the arguments, s. 7, sub-s. (3), has been treated by both sides as applicable to cheques. The only contest has been as to its true meaning and effect. Now, *Bank of England* v. *Vagliano Brothers* (1) appears to me to settle conclusively, first, that the Act, where unambiguous, defines what the law is, and that it is of little use to inquire whether it alters or adopts the law which existed up to the time when it was passed; secondly, that in every case in which, as a matter of fact, it can be predicated of the "payee" that he is fictitious or non-existing, the bill may be treated as payable "to bearer" (per Lord Herschell, p. 146); and, thirdly, that it may be so treated by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer. An attempt was made by Mr. Tindal Atkinson in his very subtle and ingenious argument to import into the sub-section the qualification that the payee, in the case of a cheque, must be a non-existing or fictitious person to the knowledge of the drawer, in order to come within the enactment. This seems to be contrary to the whole tenour of the decision in *Vagliano's Case*. (1) The language of the Act, say their Lordships, one and all, is clear and unambiguous and admits of no qualification, and it is against the true canons of construction to import one. It is quite true that Lord Herschell enters into a discussion to shew that in the case of a bill accepted there is no injustice or hardship done to the acceptor by the enactment, and gives reasons, many of which are not applicable to the case of a cheque, which has no acceptance, and is not intended to have one. The discussion was natural enough with reference to *Vagliano's Case* (1); but with all due submission it was supererogatory, when their Lordships had once come to the conclusion that the words of the Act were unambiguous and unqualified. But much of the reasoning is equally applicable to a cheque. Who is it that sends the cheque forth under such circumstances that an indorsement to complete its

(1) [1891] A. C. 107.

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negotiability is impossible? The drawer. Whose duty was it to ascertain that there was a real payee before signing it? The drawer's, surely. Who rendered possible the particular fraud of putting a false name on the back by way of indorsement? The drawer. And who, therefore, ought to suffer if one of two innocent persons must suffer? Why, surely the drawer. And how is it possible to import into sub-s. 3 a proviso that the general enactment, though applicable if the bill has been accepted, is not to apply against the drawer if unaccepted, or to read the same words as meaning one thing if applied to one set of circumstances, and something quite different if applied to another? I have, therefore, no doubt that these cheques are to be treated as payable to "bearer." If so, the defendant was entitled to recover upon the cheques, if a holder in due course, and by s. 30, sub-s. 2, of the Bills of Exchange Act, 1882, he, as the holder, is primâ facie deemed to be a holder in due course. It lies, therefore, upon the plaintiffs, in order to succeed in this action, to prove that the defendant was not a holder of these cheques in due course—that is (as he admittedly gave value for them), that he was not a holder in good faith, or that he had notice of a defect in the title of Piper.

[The learned judge then proceeded to discuss the evidence, and found as a fact that the defendant took the cheques in good faith.]

I am therefore of opinion that the defendant is entitled to judgment, and the view I have taken relieves me from the necessity of considering a variety of other points raised on behalf of the defendant by Sir E. Clarke and Mr. Finlay.

Judgment for the defendant.

Solicitor for plaintiffs: *H. S. Clutton.*

Solicitors for defendant: *Stanley Attenborough & Tyer.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1895
July 10.

ROBB *v.* GREEN.

Master and Servant—Implied Obligation of Servant—Improper use of Information obtained during Service—Breach of Confidence.

The defendant, being employed by the plaintiff as manager of his business, surreptitiously copied from his master's order-book a list of the names and addresses of the customers, with the intention of using it for the purpose of soliciting orders from them after he had left the plaintiff's service and set up a similar business on his own account. Subsequently, his service with the plaintiff having terminated, he did so use the list:—

Held (affirming the judgment of Hawkins J.) that it was an implied term of the contract of service that the defendant would observe good faith towards his master during the existence of the confidential relation between them, and that the defendant's conduct was a breach of that contract in respect of which the plaintiff was entitled to damages and an injunction.

APPEAL from the judgment of Hawkins J. at the trial of an action before him without a jury.

The action was brought to recover damages against the defendant, who had been in the service of the plaintiff, a tradesman, but who had left him and set up in a similar business on his own account, for improperly soliciting his late master's customers to transfer their custom to himself, and for taking during his service, in breach of his duty and in violation of his contract of service, copies of the names and addresses of the customers from his master's order-book to facilitate those solicitations, and using them for that purpose to his master's detriment. The plaintiff likewise claimed an injunction to restrain the defendant from using the information so obtained by him by copying such names and addresses. The facts are fully stated in the report of the case in the Court below. (1) The learned judge gave judgment for the plaintiff for 150*l.* damages, and granted an injunction in the terms stated in that report.

J. W. McCarthy, for the defendant. It may be that there is an implied promise in a contract of service that the servant will

(1) Ante, p. 1.

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serve the master with fidelity, and that the defendant was, by virtue of that implied promise, bound not to use information which he procured in the course of his service to the detriment of his master, while the service continued; but here the complaint is in respect of the use of such information after the service had come to an end. It is submitted that there was no implied stipulation which prevented the defendant, after his service was at an end, from competing with his former master and soliciting custom from persons whom he knew to have been his customers from information obtained in the course of the service. *Nichol* v. *Martyn* (1), *Reuter's Telegram Co.* v. *Byron* (2), and *Irish* v. *Irish* (3) are authorities in the defendant's favour. [He also cited *Morgan* v. *Ravey* (4); *Helmore* v. *Smith* (5); *Pearson* v. *Pearson* (6); *Tipping* v. *Clarke* (7); *Trego* v. *Hunt* (8); *Lamb* v. *Evans* (9); *Tuck* v. *Priester* (10); *Prince Albert* v. *Strange* (11); *Merryweather* v. *Moore*. (12)]

R. M. Bray (*Murphy, Q.C.*, with him), for the plaintiff, referred to *Louis* v. *Smellie*. (13) [He was stopped by the Court.]

LORD ESHER M.R. In this case the defendant, while he was in the service of the plaintiff, copied from the plaintiff's order-book, at a time when, as he himself admitted, he thought nobody could see him, a list of the plaintiff's customers, not for the purpose of using it for the benefit of his master, but for the purpose of keeping it unknown to his master, and using it, as soon as he left the plaintiff's service, so as to get hold of the plaintiff's customers and induce them to transfer their custom to himself. The question is whether such conduct was not what any person of ordinary honesty would look upon as dishonest conduct towards his employer and a dereliction from the duty which the defendant owed to his employer to act towards him with good faith. I think the judge was perfectly justified in

(1) 2 Esp. 732.
(2) 43 L. J. (Ch.) 661.
(3) 40 Ch. D. 49.
(4) 6 H. & N. 265.
(5) 35 Ch. D. 449.
(6) 27 Ch. D. 145.
(7) 2 Hare, 383.
(8) [1895] 1 Ch. 462.
(9) [1893] 1 Ch. 218.
(10) 19 Q. B. D. 629.
(11) 1 Mac. & G. 25.
(12) [1892] 2 Ch. 518.
(13) In C. A. July 9, W. N. (95) 115 (7).

holding that such conduct was a breach of the trust reposed in the defendant as the servant of the plaintiff in his business. The question arises whether such conduct is a breach of contract. That depends upon the question whether in a contract of service the Court can imply a stipulation that the servant will act with good faith towards his master. In this case it is said that the contract of service was in writing; but there is nothing in the express terms of the contract that contradicts such an implication. I think that in a contract of service the Court must imply such a stipulation as I have mentioned, because it is a thing which must necessarily have been in view of both parties when they entered into the contract. It is impossible to suppose that a master would have put a servant into a confidential position of this kind, unless he thought that the servant would be bound to use good faith towards him; or that the servant would not know, when he entered into that position, that the master would rely on his observance of good faith in the confidential relation between them. Where the Court sees that there is a matter of this kind which both parties must necessarily have had in their minds when entering into a contract, that is precisely the case in which it ought to imply a stipulation. We have the authority of Bowen L.J. in the case of *Lamb* v. *Evans* (1) that there is such an implication in a contract of service. He said in that case, after stating that there is no distinction between law and equity as regards the law of principal and agent: "The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile." Therefore, I think the learned judge in the Court below was quite right in making the implication he did, and holding that there was a breach of that implied contract which entitled him to award damages to the plaintiff. Then

(1) [1893] 1 Ch. 218, 229.

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with regard to the injunction, I think it is quite clear that in equity the plaintiff was entitled to an injunction against the defendant in respect of the breach of faith which he was committing, and which he appeared likely to continue in future. For these reasons I think the judgment must be affirmed.

KAY L.J. The judgment appealed against directs three things: first, that the defendant shall pay to the plaintiff 150*l.* damages; secondly, that the defendant shall deliver up to the plaintiff to be destroyed the list of the names and addresses of the plaintiff's customers copied or extracted by the defendant from the plaintiff's books, and all copies or extracts of or from such list now in his possession or under his control; and, thirdly, that the defendant shall be restrained from making use of the information so obtained by him by copying or extracting such names and addresses. The judge has found that the defendant, while in the employment of the plaintiff as his servant, copied from his master's books a list of the plaintiff's customers with their addresses, with the intention of using that list, when he had left the plaintiff's service, in order to set up a rival business and to induce the plaintiff's customers to transfer their custom to him. The judge has further found that he did this surreptitiously and in breach of his duty to his master. Conduct of this kind has for a long time back been made a ground for relief against persons in the position of the defendant; and I will refer to one or two of the earlier decisions for the purpose of shewing upon what foundation the right to such relief has been based. In *Yovatt* v. *Winyard* (1), the defendant was employed by the plaintiff, the proprietor of certain recipes for veterinary medicines, as an assistant, under an agreement by which he was to be instructed in the general knowledge of the business, but was not to be taught the mode of composing the medicines. The defendant surreptitiously got access to the book of recipes and copied them, and then, leaving the plaintiff's service, set up in business for himself and sold medicines similar to those sold by the plaintiff. Lord Eldon granted an injunction against him "upon the ground of there having been a breach of trust

(1) 1 J. & W. 394.

and confidence." There have been many similar decisions subsequently to which it is unnecessary to refer; but in *Morison* v. *Moat* (1) Turner V.-C. sums up the law on the subject thus: "The plaintiff's case was rested in argument upon the ground that the defendant had obtained this secret by breach of faith or of contract on the part of Thomas Moat." Then, after mentioning a subsidiary ground on which relief was claimed, he goes on: "The true question is whether, under the circumstances of this case, the Court ought to interpose by injunction, upon the ground of breach of faith or of contract. That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract; and in others, again, it has been treated as founded upon trust or confidence—meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but, upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." Then he refers to the language of Lord Cottenham in *Prince Albert* v. *Strange* (2), where he says: "This case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract, would of itself entitle the plaintiff to an injunction." In the later case of *Lamb* v. *Evans* (3), Bowen L.J. distinctly treats the matter as depending at law upon an implied contract arising out of the confidential relation between the master and servant. On whatever ground it is put, it is clear in this case that an injunction ought to be granted, either on the ground of breach of trust or breach of contract. It is enough for that purpose to say that, where we find a servant using, after he has left his employment, a document surreptitiously compiled from his master's book to the detriment of his master, there is a breach of trust, if not a breach of contract. The other items

(1) 9 Hare, 241, 255. (2) 1 Mac. & G. 25.
(3) [1893] 1 Ch. 218.

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of relief granted are the delivery up of the list made and the damages. With regard to the first, it seems to me clear that such a document surreptitiously made in breach of the trust reposed in the servant clearly ought to be given up to be destroyed. As to the damages, I think there is more difficulty. The right to them depends on whether the conduct of the defendant can be regarded as a breach of an implied contract. According to the view taken by Bowen L.J. in *Lamb* v. *Evans* (3), it can; and in the result I come to the conclusion that the judgment in that respect must be upheld. For these reasons I think that the appeal should be dismissed.

A. L. SMITH L.J. It is my opinion that this judgment should be upheld, and upon the ground that there has been a breach by the defendant of his contract of service with the plaintiff. I think that it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity. That is what was said in the case of *Lamb* v. *Evans* (1), and I entirely agree with it. That being so, has the defendant acted with good faith and fidelity? The learned judge says in his judgment (2): "The defendant admitted it" (the list) "was written by him when nobody saw him, that his object was to use the names, and he confessed that he had regarded what he did as unfair and dishonourable, and that probably his master would have turned him away had he known of his misconduct; but that he did not think his employment was confidential, or that he was bound to protect his master's interests, as it was not expressly so said."

This last statement by the defendant of what he thought I do not believe; but it is immaterial whether he did so or not. There could not well be a worse breach of the implied contract which I have mentioned than the conduct of the defendant in this case. I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Roopers & Whately.*

Solicitors for defendant: *Church, Rendell & Todd.*

(1) [1893] 1 Ch. 218. (2) Ante, p. 8.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1895
July 8.

MONTGOMERY *v.* FOY, MORGAN & CO.

Practice—Adding Parties—Ship—Deposit of Freight with Warehouseman—Action by Shipowner for Declaration of Title—Order XVI., *r.* 11—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 493–496.

Cargo having been placed by the shipowner in the custody of a warehouseman with notice of a lien for freight under the Merchant Shipping Act, 1894, s. 493, the consignees, who had no property in the cargo, but were merely agents of the shippers for the sale of it, in order to obtain possession of it, deposited the amount of the freight claimed with the warehouseman with a notice to retain it under s. 496 of the Act. The shipowner brought an action against the consignees for a declaration of title to the money so deposited, and an order for payment of it to him:—

Held, that there was jurisdiction under Order XVI., r. 11, to order that the shippers of the cargo should be added as defendants in the action, in order that they might counter-claim against the plaintiff damages for short delivery and injury to cargo.

APPEAL from an order of Mathew J. at chambers.

The facts were as follows. A company called the British Saw Mills Company shipped a cargo of deals in British Columbia upon the plaintiff's ship for carriage to London under a bill of lading. The defendants, who were the consignees of the cargo, were not persons to whom the property in the cargo passed, but were merely the shippers' agents for the sale of it in this country. Upon the arrival of the ship, the consignees not taking delivery of the cargo, the captain placed it in the custody of the Surrey Commercial Dock Company, with a notice that it was subject to a lien for freight to the amount of 276*l.* 9*s.* 7*d.*, under the provisions of the Merchant Shipping Act, 1894, ss. 493, 494. The defendants, in order to obtain possession of the cargo, deposited the amount so claimed for freight with the Surrey Commercial Dock Company, under s. 495 of the Act, giving them notice to retain it under s. 496, as they did not admit any sum to be so payable. The plaintiff thereupon brought an action against the defendants, claiming a declaration that he was entitled to a lien on the sum deposited, and an order for payment of it to him. The British Saw Mills Company claimed to be entitled to

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damages against the plaintiff under the bill of lading for short delivery and injury to the cargo; and an application was made by the defendants and the company to the judge at chambers for an order that the company should be added as defendants in the action, in order that they might counter-claim against the plaintiff in respect of such damages. The learned judge granted the application.

Hugh Boyd, for the plaintiff. The rule with regard to adding parties is Order XVI., r. 11. It is submitted that the judge had no jurisdiction to make an order for the addition of the British Saw Mills Company as defendants under that rule; and secondly, if he had jurisdiction, he wrongly exercised the discretion given to him by the rule. The rule only enables the judge to order the addition of a party "who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." The question whether the plaintiff is liable to pay damages to the British Saw Mills Company for short delivery and injury to cargo is not a question involved in the cause or matter. The question in this action is whether the plaintiff is entitled to payment of the sum deposited for the freight. Under the bill of lading the freight is an ascertained amount due to the shipowner immediately on delivery of the cargo over the ship's side; and, in order to obtain delivery of the cargo, the full amount of the freight would have to be paid. Why should the position of the parties be altered because, the consignees not taking delivery, the cargo is deposited with warehousemen under the provisions of the Merchant Shipping Act? The intention of the Act is that the lien of the shipowner shall be preserved, and he shall be entitled to payment out of the sum deposited of such amount as would have been payable in respect of freight by the consignees, if they had taken delivery of the cargo. Why should the payment of the freight, which by the terms of the bill of lading is to be paid on delivery of the cargo, be delayed until it is ascertained whether the shippers, who are out in British Columbia, have a right to damages? The British Saw Mills

Company are not interested in the question involved in this action. There are many authorities which shew that a plaintiff cannot be compelled to join as defendant a person whom he does not wish to sue, and who is not interested in the question involved in the action, merely because that person would, if joined, have a counter-claim against the plaintiff: *Norris* v. *Beazley* (1); *Moser* v. *Marsden*. (2) [He also cited *White & Co.* v. *Furness, Withy & Co.* (3); *Smurthwaite* v. *Hannay*. (4)]

Leck, for the defendants, was not called upon.

LORD ESHER M.R. In this case there was a contract of affreightment contained in a bill of lading which was made between the plaintiff and the British Saw Mills Company, who were really the shippers of the goods, and the persons eventually liable to pay the freight. The defendants could only become liable to pay the freight by reason of the lien for freight if, as consignees, they took delivery of the cargo. The House of Lords has held, in *White & Co.* v. *Furness, Withy & Co.* (3) that, where under such circumstances the cargo is warehoused under the Merchant Shipping Act, the shipowner cannot sue consignees who have no property in the cargo, but are merely agents for the owner of the cargo, for the freight, but must bring an action for a declaration that he is entitled to the amount deposited with the warehouseman in respect of the freight. That, therefore, is the form in which he must sue; but in substance it is a mode of getting at the freight, which has been paid to the warehouseman. If the plaintiff obtains the declaration asked for, the result will be, if nothing else happens, that the judge will say that the warehouseman must pay over the money to him. In such an action as that, the consignees cannot set up a right of set-off or counter-claim belonging to the owners of the goods; and, therefore, if the matter stood so without bringing in the real principals of the consignees, there would be no defence, and the warehouseman must pay over the whole of the money to the plaintiff. But the shippers are the persons who made the contract of affreightment with the plaintiff, and out of whose

(1) 2 C. P. D. 80.
(2) [1892] 1 Ch. 487.
(3) [1895] A. C. 40.
(4) [1894] A. C. 494.

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pocket the amount of the freight must eventually come; and, if they have to pay the whole of the freight, they may bring a cross-action and recover in that action damages for short delivery or injury to the cargo. Suppose the two actions were tried on the same day: the Court could say, I think, that, the plaintiff in the one action having substantially recovered the money deposited as the amount of the freight, and the plaintiffs in the other having recovered so much as damages, the two amounts might be set off against each other. Then comes the question whether, for the purpose of preventing the useless and expensive formality of having two separate actions, the Court may not add the owners of the cargo as defendants in the original action, and so settle the whole matter in one action and by one trial. Order XVI., r. 11, provides that the Court or a judge may make an order to add "the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." Here the matter before the Court is the contract of affreightment, and there are disputes arising out of that matter as between the plaintiff and the defendants and the company whom it is sought to add as defendants, and who were the defendants' principals in the matter. I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicature Acts, namely, that, where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials. It appears to me that the words of the rule are large enough to allow of the joinder of the British Saw Mills Company as defendants in this case. I think the question arising between them and the plaintiff is a "question involved in the cause or matter" within the meaning of the rule. The plaintiff claims the whole amount deposited in respect of the freight; but the amount to which he is entitled may be diminished by his being liable to pay to the defendants whom it is sought

to add damages for breach of the same contract under which the freight is claimed. It seems to me that the case will stand thus: the plaintiff will be entitled to a declaration of title to the amount of the freight; and, if the British Saw Mills Company establish their counter-claim, they will have judgment for that; and the result will be that the judge will only say that the warehouseman must pay over any balance that may remain after deducting the amount of the damages so recovered by the company. None of the cases which have been cited appears to me to govern this case. With regard to the case of *Norris* v. *Beazley* (1), it is to be observed that it was decided at an early stage of the decisions with regard to the meaning of the Judicature Acts, and, though I do not say that the actual decision was wrong, I do not think that all the statements made in the judgments could now be supported. I am of opinion that the order of Mathew J. was right, and that this appeal should be dismissed.

KAY L.J. I wish to guard myself against being supposed to decide that in all cases it would be a sufficient reason for joining a person as defendant, that, if joined, he would have a counter-claim against the plaintiff. This is a peculiar case. A ship having arrived, goods were landed and placed in the custody of warehousemen under the Merchant Shipping Act, and a sum of money was deposited with the warehousemen under the provisions of the Act to enable the consignees, who were merely agents for sale and not the owners of the goods, to take the goods away. It has been decided by the House of Lords that, under the circumstances which existed in the present case, what the shipowner must do is to bring an action for a declaration that he is entitled to the money so deposited in respect of his freight; and I suppose an order would be made in that action to the effect that the amount of the freight must be paid over to him. In the present case an action of that kind was brought, and the only persons made defendants in the action were the consignees. The defendants say that they are really only the agents of the British Saw Mills Company in the matter, and they want to have them added as defendants. It is contended for the plaintiff

(1) 2 C. P. D. 80.

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that, although the company are the persons who must eventually pay the freight, they ought not to be added or to be permitted to set up their claim for damages as a counter-claim in this action. The question turns upon the construction of Order XVI., r. 11, which provides that the names of any parties may be added "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." The counsel for the plaintiff argues that the question that would be raised by the counter-claim, namely, whether the British Saw Mills Company is entitled to damages for short delivery and injury to the cargo, is not a question involved in the action, and therefore is not within the terms of the rule. No one, however, can deny that the question what amount the plaintiff is entitled to receive in respect of freight is a question involved in the action. Suppose in such a case as this the shipper of goods had a set-off. That set-off cannot be raised unless he can be made a party to the action. Would it not be a good reason for making him a party that he could raise such a set-off, and so diminish the amount for which the plaintiff ought to have a declaration of title in respect of his freight? I cannot conceive a better reason for the application of the rule than that, if the party really interested is brought before the Court, he may be able to shew that money is due to him from the plaintiff which may diminish or altogether wipe out the freight due to the plaintiff. Of course, a counter-claim is not quite the same thing. But, suppose in such a case as this a cross-action was brought by the shippers for short delivery or damage to cargo, I think the Court would certainly say that the two actions ought to be tried together, on the ground that it was impossible to determine what sum ought to be paid over to the plaintiff for freight until it was determined what, if anything, was due to the shippers in the cross-action. Substantially the question raised by the cross-action must be determined in order to determine the question what amount the plaintiff is entitled to receive in respect of his freight. It appears to me that the Court is only taking a slight step further in saying that, the consignees not being the persons really liable for the freight, and the persons so liable

asserting a right of cross-action, before the Court makes a declaration as to the amount which the plaintiff is entitled to receive in respect of his freight, it will have the persons really liable for the freight before it, and allow them to set up their claim, not by cross-action, but by way of counter-claim. I think the case comes within the terms of the rule as being one in which the Court cannot rightly determine the question raised in the action without having the owners of the goods before it, and so determining all the questions involved in the cause or matter. I therefore think that the learned judge had jurisdiction to make the order, and that this appeal should be dismissed.

A. L. Smith L.J. I think this order was rightly made. In this case the British Saw Mills Company shipped a cargo of deals by the plaintiff's ship to this country, and they were the persons liable to pay the freight. The defendants were the company's agents in this country for the sale of their goods, to whom the cargo was consigned. Upon the arrival of the ship, the defendants not taking delivery of the cargo ex ship, the cargo was placed in a warehouse in accordance with the Merchant Shipping Act, the shipowner retaining his lien for freight. Thereupon the defendants, in order to obtain possession of the goods, deposited the amount of the freight with the warehousemen and took the goods. The persons really interested in the amount to be paid in respect of the carriage of the goods are the shipowner on the one hand, and the British Saw Mills Company on the other, for, though the money deposited was actually paid by the defendants, ultimately the British Saw Mills Company will have to pay that amount to the defendants. In these circumstances, the plaintiff, following the course indicated by the decision of the House of Lords in *White & Co.* v. *Furness, Withy & Co.* (1), brings an action for a declaration of lien on the money deposited. Such a declaration would not by itself be of any use; the real object is to obtain an order that the money shall be paid over to the plaintiff. The proposition put forward is that the parties really interested in the money in opposition to the plaintiff, namely, the British Saw Mills Company, cannot

(1) [1895] A. C. 40.

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be brought in as defendants in the action to settle the matters in dispute once for all between them and the plaintiff. But suppose this were so and they were to bring a cross-action, and, before the action for declaration of lien and for payment over of the money brought by the shipowner came on for trial, the Court was informed that there was a dispute between the parties really interested in the money as to whether the shipowner was liable to pay damages in respect of injury to the cargo, the Court would certainly order that the two actions should be brought on for trial together, and would not order the money deposited to be paid over to the shipowner until the question really in issue as to his having damaged the cargo had been tried out. There is no substance in the point now raised by the plaintiff, for the sole question is, whether the British Saw Mills Company shall raise their claim against the shipowner by cross-action or by counter-claim. It was contended that Order XVI., r. 11, does not give jurisdiction to make the order my brother Mathew made in this case. I cannot agree with that contention. The whole matters in dispute arise under the one contract of affreightment; and the real question involved is what amount, if any, the shipowner is entitled to receive from the shippers for having brought the goods to this country when the disputes between them are adjusted. It is not disputed that the amount of freight due under the bill of lading is so much; but the shippers say that under the same contract they are entitled to damages for injury to cargo, and therefore they ought only to pay the difference, if any, over and above the amount of the damages to which they are entitled. I think we should be frittering away the effect of the rule if we held that the cargo owners were not interested in the settlement of the questions involved so as to disentitle them to be added as defendants. I think that they are, and that the cases upon which the counsel for the plaintiff relied do not govern this. In my opinion this appeal fails.

Appeal dismissed.

Solicitors for plaintiff: *W. A. Crump & Son.*
Solicitors for defendants: *Lowless & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1895
May 23.

STRACHAN *v.* UNIVERSAL STOCK EXCHANGE, LIMITED.

Stock Exchange—Gaming and Wagering Contract—Payment of Differences—Securities deposited as Cover—Action to recover back Securities—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

By the Gaming Act, 1845, it is enacted that, "No suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing . . . which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

In an action to recover back securities deposited as cover for differences which might arise on gambling transactions in stocks and shares:—

Held, that the statute applies only to money or valuable things deposited as the stake to abide the event of a wager, and does not apply to money or valuable things deposited as security for the observance by the loser of the terms of the wagering contract:

Held, also, that the authority to retain the securities might be revoked and the securities recovered back at any time before the holders had appropriated them to their own use.

APPLICATION by the defendants for a new trial, or that judgment should be entered for them.

The action was brought to recover back certain shares deposited by the plaintiff with the defendants, who were not members of the Stock Exchange, but carried on the business of stock and share jobbers or dealers. The plaintiff alleged that a number of transactions between himself and the defendants, which purported to be for the purchase by him from the defendants, or the sale by him to the defendants, of stocks, shares, and securities, were made by way of gaming and wagering, and not by way of valid contract of sale or purchase, and that the shares deposited by him were so deposited as cover or security for the payment of differences upon the rise and fall of the tape prices of the stocks, shares, and securities dealt with. The plaintiff also claimed to have revoked the authority of the defendants to hold the shares as security, and to have demanded them back before the time agreed on for the settlement of the claims on

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the differences. The defence was a denial that the transactions between the parties were gambling transactions, and a claim to retain and realize the deposited securities in accordance with the terms of the deposit; and alternatively, that if the transactions were gambling transactions the plaintiff was not entitled to the relief claimed by reason of the Gaming Act, 1845 (8 & 9 Vict. c. 109), and the Gaming Act, 1892 (55 & 56 Vict. c. 9).

The action was tried before Cave J. and a special jury, and in answer to a question left by the learned judge the jury found that the whole of the transactions were gambling transactions. The learned judge thereupon entered judgment for the plaintiff, in respect of the deposited shares, for a return of those securities or their value.

The defendants appealed. The grounds of appeal were that, by reason of the Gaming Acts, the plaintiff could not maintain the action; that there was no evidence to go to the jury that the transactions were by way of gaming and wagering; and that there had been misdirection by the learned judge. The arguments and judgments on the two latter points are omitted from this report.

Lawson Walton, *Q.C.*, and *Pollard*, for the defendants. If the contract between the parties is void as a wagering transaction, the case comes within 8 & 9 Vict. c. 109, s. 18: "No suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." The plaintiff is prevented by the statute from asking for the assistance of the Court to recover back his securities. [They cited *Manning* v. *Purcell* (1); *Hampden* v. *Walsh* (2); *Thacker* v. *Hardy* (3); *Shaw* v. *Caledonian Ry. Co.* (4); *Lowenfeld* v. *Howat* (5); *Universal Stock Exchange, Limited* v. *Stevens*. (6)]

Muir Mackenzie (*Bigham*, *Q.C.*, with him), for the plaintiff. This

(1) 7 D. M. & G. 55.
(2) 1 Q. B. D. 189.
(3) 4 Q. B. D. 685.
(4) 17 Court Sess. Cas. 4th Series, 466.
(5) 19 Court Sess. Cas. 4th Series, 128.
(6) 40 W. R. 494.

was not a deposit of anything to abide the event of a wager, but by way of security that the person who made the deposit would pay the amount of the wager if he lost. At any rate, the agreement between the parties shews that the settlement was to be made at the end of three months; and before that time the plaintiff, by bringing this action, repudiated the agreement and demanded back his shares: *Varney* v. *Hickman*. (1)

Pollard, in reply.

LORD ESHER M.R. This case on the real facts as distinguished from the pleadings stands thus. The plaintiff is claiming from the defendants the return of certain valuable shares which he placed in their hands. The answer of the defendants is that the shares were placed in their hands as security for the performance of a contract, so that if the plaintiff failed to perform it the defendants were entitled to realize and pay themselves the amount of the damages caused by the breach of contract. The reply to this is that there never was a contract, because the pretended contract was one by way of betting and wagering; so that it follows that if there was no contract there was no breach of contract, and the defendants have no ground for retaining the securities. The first question is whether the contract set up was made by way of gaming and wagering. With regard to that it is said that there was no evidence to go to the jury. It is also alleged that there was misdirection on the part of the learned judge; but that cannot be maintained. [His Lordship then dealt with the evidence, and continued:—]

To my mind, the jury were perfectly justified in concluding that the real contract between the parties was that they should play for differences, and that there should be no delivery of shares, and that in fact the contract was one by way of wagering and gambling.

Then comes the Act of Parliament, which says that such a contract is null and void—in other words, there is no contract. Assuming that to be so, we have here certain shares delivered by one party to the other as security against a breach of contract and inability or refusal to pay the consequent damages. It is

(1) 5 C. B. 271.

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said that by the 18th section of 8 & 9 Vict. c. 109, no action can be brought to recover them back, and therefore the parties in whose hands they are can keep them. If that were so, it would come to this, that though the person who deposited the securities owes the other nothing, because the alleged contract between them is null and void, nevertheless the other can keep the securities and realize them and pay himself anything that would be due if the contract were a valid one. Further, if the damages would only amount to 5*l.*, and the securities are worth 1000*l.*, the depositor has no remedy, and the holder of the securities may sell them and realize their full value. In my opinion, the valuable things which in this case were given as security against a breach of contract and a non-payment of damages were not deposited to abide the event of a wager within the meaning of the 18th section. That section applies where there is a deposit upon these terms: that on the determination of the event of the wager that which is deposited is, by that alone, to become the property of the winner. That is not the case here, where there is a deposit by way of security, for the property does not pass the moment the bet is lost and won. There is something else which must happen, which is, that there being a breach of contract the damages arising from it are not paid. I think a valuable thing deposited by way of security is not deposited "to abide the event on which any wager shall have been made" within the meaning of the 18th section.

That is enough to settle this matter; but I will go further and say, that even if this were a deposit within the meaning of the statute, still, if the contract of deposit is annulled by the party who made the deposit at any time before the deposit is realized, he can nullify the deposit and recover back the thing deposited. In this case, even if there were a deposit within the meaning of the statute, the plaintiff, by bringing his action before the time at which the defendants could deal with the securities, put an end to his contract that they should be used as a deposit, and is entitled to recover them.

The plaintiff is entitled to recover the securities, and the appeal must be dismissed.

A. L. SMITH L.J. This is an action brought by the plaintiff to recover certain shares which he had deposited with the defendants, by way of "cover," as regards certain transactions which the plaintiff was about to carry on with the defendants. The case was tried before Cave J. and a special jury, and the question which he left to them was whether the transactions were gambling transactions, and the jury found that they were. On that the learned judge gave judgment for the recovery of the shares or their value.

I think it immaterial in what way the pleadings have been framed, for the substance of them is this: The plaintiff brings his action of trover or detinue—I do not care which; I think it is trover—and he says, "Deliver me up these shares of mine which you have in your possession." The defendants say, "No, we will not, because we have a contract with you whereby we are entitled to hold them"; to which the plaintiff answers, "That contract which you are setting up is a gambling contract, and you cannot rely upon it in answer to my claim." The first question which arises is whether or not there was evidence which my brother Cave ought to have submitted to the jury—that the contract was in reality an agreement between the parties to game and wager within the meaning of the Wagering and Gaming Act. [The Lord Justice dealt with the evidence, and continued:—]

It is perfectly clear that there has been no misdirection; and that there was evidence to go to the jury that these transactions were gambling transactions from beginning to end I cannot doubt. Therefore, as regards this part of the case, I am of opinion the appeal fails.

Now I come to the second point. It is said that, even assuming there was evidence to go to the jury, and although the jury found that these were gambling transactions, my brother Cave ought not to have ordered the return of these shares, which had been deposited by way of cover, because of the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18. It is said that, although this section enacts that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void," it also goes on and enacts that "No suit shall be brought or maintained in any court of law or equity

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for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made"; and, say the defendants, the last limb of that section prevents the maintenance of this action. I do not agree. There are two reasons why it does not. I think that the true reading of that section is, that where a man deposits with a stakeholder his stake in the wager—a sum of money or anything of value—a gold cup, for instance—to abide the event of the wager, that comes within the second provision of the section, assuming there had been no revocation; but a mere deposit by way of cover, by way of security, does not come within the section, for it is not a deposit to abide the event of a wager. But, assuming I am wrong in the construction which I put upon this section, the other reason remains, namely, that the authority of the stakeholder has been revoked in time. The law as to this is accurately laid down in Stutfield on the Law relating to Betting, Time Bargains, and Gaming; and I will read from the third edition, p. 55, which is a résumé of what I find in the cases. It is this: "There is a long series of decisions to the effect that this provision"—that is, the second provision of this section of the Gaming Act—"only applies to actions brought by the winner of a wager either against a stakeholder or against the loser to recover his winnings, and does not prevent either party from revoking the authority of the stakeholder before the money is paid over to the winner, and suing to recover his stakes." This is accurate. It will also be found in *Varney* v. *Hickman* (1), and in the case of *Hampden* v. *Walsh*. (2)

Now, were the defendants stakeholders or not? They were two of the wagerers, co-wagerers with the plaintiff; but that would not make them any the less stakeholders if these shares were deposited as it is stated by the plaintiff that they were. The defendants before action had done nothing to alter the condition of these shares which were deposited with them as stakeholders. They had not appropriated them to their own use, and they were still in their possession as stakeholders; and by bringing the action the authority to keep them any longer in their posses-

(1) 5 C. B. 271; 17 L. J. (C.P.) 102. (2) 1 Q. B. D. 189.

sion was revoked by the plaintiff. Upon this ground also, the point which is taken as to this action being not maintainable fails.

For both these reasons I am of opinion the appeal should be dismissed, with costs.

RIGBY L.J. There are two questions here: first, whether the contracts were really contracts of wagering or gaming or not. The jury have found that they were. I will not repeat what has been already said; but, adopting all the observations that have been made on the evidence, I come to the same conclusion—that there was evidence upon which a jury might well find that the written transactions, which are of course in form—it is an elementary part of such a transaction that they should be in form—were a cloak for the real transactions, and that the real transactions were transactions in differences—gaming and wagering transactions of a simple character.

Then comes the question as to whether the securities that were deposited to cover any loss that might not be made up by payments from the customer can be recovered. Treating that independently of any statutory provision, it is a very simple case. The claim may be called a claim in trover or detinue, or it may be called, and I rather lean to that point of view myself, redemption. Here is a man who claims to be a mortgagee. Directly the transactions are held to be gaming transactions, it follows as a matter of course that his claim in respect of them fails; and where from the nature of the transaction itself nothing can be due on the mortgage, the mortgagee must deliver up the security.

Then it is said, Here is an Act of Parliament which prevents that. First of all, under the statute there is an avoidance of contracts and agreements by way of wagering which are pronounced null and void, and no suit is to be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won. Then, not, as I think, by way of an independent enactment, that is to be treated entirely as if it had no context, but, for the purpose of covering a void that would be left, it is provided that the prohibition is to extend to "any sum of money or valuable thing which shall have been

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deposited in the hands of any person to abide the event on which any wager shall have been made." That appears to me to mean any sum of money or valuable thing to become the property of the winner when the event shews that he has won. He cannot bring his action directly against the person who has made the bet with him; he cannot bring an action against the person who has received money or a valuable thing which is to go to the winner. This, I conceive, is all that is meant by the section. It is not necessary to go through the cases, but there is plenty of authority for that construction, and, if there were not, I should be ready to come to such a decision independently of authority.

Applying this view of the statute to the state of things in this case, it is clear that these securities were not deposited to become the property of the winner of the event on which the wager was made. The case stands, then, that the shares were deposited as security, and it is proved that there is nothing due upon the security. There is, therefore, nothing left to be done except to order that they shall be given up, or, if they cannot be given up, to direct that their value should be paid, which I think might equally be done at law or in equity in such a case. The judgment was therefore right, and should be affirmed.

Appeal dismissed.

Solicitor for plaintiff: *Theodore Allingham.*
Solicitors for defendants: *Last & Sons.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1895
July 23.

BOWER *v.* HETT.

Bankruptcy—Assets—Execution—Money paid under an Execution—Money paid to avoid Sale—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2.

The provision in s. 11, sub-s. 2, of the Bankruptcy Act, 1890, by which the trustee is entitled, as against the execution creditor, to money paid under an execution in order to avoid sale, does not apply to money paid after execution issued in order to prevent seizure, and the execution creditor is entitled to such money as against the trustee.

APPEAL from the judgment of a Divisional Court (Lord Russell of Killowen C.J. and Charles J.).

The facts, which are more fully stated in the report of the case in the Court below (1), were briefly as follows: —

The plaintiff had recovered a judgment for 23*l.* 15*s.* 8*d.* in the county court, and a warrant of execution had been issued on the judgment to the defendant as high bailiff of that court. On October 1, 1894, the defendant went to the shop of the judgment debtor and seized goods there under the warrant. An arrangement was entered into between them under which the judgment debtor gave to the defendant a letter acknowledging that he was in possession of the goods, and giving him liberty to enter upon the premises as and when he might think proper, and the defendant went out of possession. On October 2 the judgment debtor absconded. His shopman afterwards locked up the premises and gave the key of them to the defendant. On October 3 the judgment debtor's father went to the defendant, and promised that, if the defendant would give up the key of the premises, he would on the next day pay the amount of the judgment debt. On October 4 the father accordingly paid the amount of the judgment debt to the defendant. On October 15 the judgment debtor presented a bankruptcy petition, of which notice was on October 16 given to the defendant. A receiving order was subsequently made against the judgment debtor and

(1) Ante, p. 51.

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he was adjudged bankrupt. The defendant paid over the money paid to him as before mentioned to the official receiver. The plaintiff thereupon brought an action in the county court against the defendant to recover the same. The county court judge gave judgment for the defendant. On appeal to the Divisional Court they reversed his decision. (1)

Dodd, Q.C., for the defendant. The money in question was money paid under an execution in order to avoid sale within the meaning of sub-s. 2 of s. 11 of the Bankruptcy Act, 1890. The bailiff had undoubtedly seized the goods of the judgment debtor on October 1, and it is contended that by virtue of the arrangement between himself and the judgment debtor he must be treated as continuing in possession all along. At any rate, when he had possession of the key of the premises in which the goods were, and so had the control of them, he must be considered as having retaken possession. If so, he would have been in a position to sell the goods under the execution. Assuming that the bailiff cannot be considered as being in possession of the goods when the money was paid, it is contended that the words "under an execution" do not necessarily involve that the goods must be in the sheriff's possession. They only mean "by virtue or in consequence of process of execution having been issued"; and money is none the less paid to avoid sale because it is paid to avoid the necessary preliminary to a sale—namely, seizure. Unless this money was paid under the execution the plaintiff would have no title to it. It cannot be material under the section whether the money paid to avoid sale is the judgment debtor's or another's, for the bailiff cannot possibly know whether the

(1) Bankruptcy Act, 1890, s. 11, sub-s. 2: "Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days; and, if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

money is the judgment debtor's money or not. [He cited *In re Pearson*. (1)]

Montague Lush, and *Sidney Clarke*, for the plaintiff, were not called upon.

LORD ESHER M.R. In this case there was a seizure of goods by the bailiff; but he went out of possession under an arrangement with the judgment debtor that he might at any time come in again and retake possession of the goods. He was therefore out of possession. If he had come in again and retaken possession, the debtor could have raised no objection; but he never did so. After he had gone out of possession, the debtor's servant handed him the key of the premises; but he never did retake possession of the goods. That being the state of things, when he is not in possession, and therefore not in a position to sell the goods, the debtor's father offers, if he will not seize the goods again, to pay him the amount of the judgment debt; and, accordingly, the next day he does pay it to him. That payment was made by the father to the defendant, in order that the money so paid might be handed over to the plaintiff, the judgment creditor, for at that time there was no question of a bankruptcy. The defendant must be considered to have taken the money so paid upon the terms on which it was paid; that is to say, as money received for the use of the plaintiff, the judgment creditor; and unless, upon the subsequent bankruptcy of the judgment debtor, the case is brought within the terms of the 2nd sub-section of s. 11 of the Bankruptcy Act, 1890, the defendant is not freed from his obligation to hand over the money to the plaintiff. The Divisional Court have held, in the first place, that the money so paid was not paid under an execution. I do not think that it can be said to have been paid under an execution when there was no execution in at the time. Again, the Divisional Court have held that, supposing that the money could be said to have been paid under an execution, the other conditions of the sub-section were not fulfilled, because the money was not paid to avoid sale. It appears to me that the view which they took was correct, and that the debtor's father paid the money, not to

(1) 3 Morrell, 187.

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avoid sale, but to prevent the bailiff from seizing the goods again. I therefore agree with the Divisional Court in thinking that the case is not brought within the sub-section, and therefore the defendant is not relieved from the obligation to pay the money to the plaintiff. For these reasons, I think the judgment of the Divisional Court should be affirmed.

KAY L.J. I am of the same opinion. The question is whether the conditions of sub-s. 2 of s. 11 of the Bankruptcy Act, 1890, have been fulfilled. To bring this case within the sub-section, the money in question must have been paid under an execution and to avoid sale. I do not think that it can be said to have been paid under an execution, because there was no existing execution at the time when it was paid. At that time the bailiff had gone out of possession, and had not retaken possession of the goods. He had, it is true, the key of the premises, and there was an agreement between him and the judgment debtor that he might at any time retake possession, but he had not in fact retaken possession. How it is possible under those circumstances to say that he was in possession I cannot see. Therefore, it seems to me clear that there was no existing execution when this money was paid. It seems to follow almost as of course that the money was not paid to avoid sale, because the section appears to contemplate a case where the sheriff or bailiff is in possession and preparing to sell, and the money is paid to avoid such sale. Here the bailiff, not being in possession, was not in a position to sell, and no sale was possible until he had retaken possession. I therefore agree that the case is not within the sub-section. I wish to reserve my opinion on the third point decided in the Divisional Court, which I do not think it necessary for the purposes of this case to decide, namely, whether, in a case where money is paid to avoid sale, it must, in order to bring the case within the sub-section, be the money of the judgment debtor.

A. L. SMITH L.J. I am of the same opinion. In order to justify the bailiff in paying over this money to the trustee in bankruptcy, the case must be brought within the terms of sub-s. 2

of s. 11 of the Bankruptcy Act, 1890. That sub-section deals with a case where, under an execution upon a judgment for an amount exceeding 20*l.*, goods of a debtor are sold or money is paid to avoid sale. The money paid by the judgment debtor's father in this case was not, in my opinion, paid under an execution in order to avoid sale, within the meaning of the sub-section, for at the time when it was paid the bailiff was not in possession, and there was no existing execution, and he was not in a position to sell.

Appeal dismissed.

Solicitors for plaintiff: *Oldman, Clabburn & Co., for C. E. Gresham, Hull.*

Solicitors for defendant: *Collyer-Bristow, Russell, Hill & Co., for Laverack & Son, Hull.*

E. L.

[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* JACOBS SMITH.

Revenue—Account Duty—Marriage Settlement of Widow—Children of First Marriage—Consideration of Marriage—Voluntary Disposition—Volunteers—Customs and Inland Revenue Acts, 1881 (44 & 45 *Vict. c.* 12), *s.* 38; 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

By s. 38 of the Customs and Inland Revenue Act, 1881, account duty is made payable on certain property including by sub-s. 2 (*a*) any property "taken under a voluntary disposition made by any person dying after June 1, 1881, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been bonâ fide made three months before the death of the deceased," and including by sub-s. 2 (*c*) any property "passing under any past or future voluntary settlement made by any person dying on or after such day," by deed or other instrument not taking effect as a will, whereby an interest in such property for life is reserved to the settlor. By sect. 11 of the Customs and Inland Revenue Act, 1889, the above-mentioned period of three months is altered to twelve months, and the expression "voluntary settlement" is made to include any trust "in favour of a volunteer," whether the instrument effecting the settlement was made for value or not as between the settlor and any other person.

By the settlement made on the second marriage of a widow it was provided that out of 19,500 fully paid-up shares which she was entitled to have allotted to her, 1000 should be allotted to each of her four adult sons by the former marriage, and the remaining 15,500 to trustees, as to 3200

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upon trust for her two infant sons and two married daughters by her former marriage, and as to the remaining 12,300 upon trust to pay a life annuity to her husband, and, subject thereto, to pay the income to the settlor for life, and hold the fund after her death, in trust for the children of the former marriage as she should appoint. The marriage was solemnized, and the shares duly allotted. The settlor died within twelve months after the settlement, having exercised by will her power of appointment in favour of the children of the former marriage:—

Held (reversing the decision of the Divisional Court), that account duty was payable, for the children of the wife by her first husband were without the consideration of the marriage; that with regard to the shares in which the settlor took no life interest, the disposition in favour of such children was therefore a "voluntary disposition" within the meaning of sub-s. 2 (*a*), though contained in a marriage settlement; and that with regard to the shares in which the settlor took a life interest the children of the first marriage took under a trust "in favour of a volunteer."

Newstead v. *Searles* (1 Atk. 265) is to be understood as explained by Lord Selborne in *Mackie* v. *Herbertson* (9 App. Cas. 303) and *De Mestre* v. *West* ([1891] A. C. 264).

APPEAL by the Crown from a decision of the Divisional Court (Wright and Collins JJ.). (1)

By a settlement dated March 18, 1890, previous to and in contemplation of the marriage of Anne Smith, widow, with G. E. Jacobs Smith, it was agreed that out of 19,500 fully paid-up 10*l.* shares which Mrs. Smith would be entitled to have allotted to her in a company about to be formed, 15,500 should be allotted to two trustees named in the settlement, and 1000 shares each to the four adult sons of Mrs. Smith. Of the 15,500 shares 1000 were to be held for an infant son of Mrs. Smith, 1000 for another infant son, and 600 each for her two married daughters and their issue. The remaining 12,300 shares were to be held in trust to pay 1000*l.* a year to the husband for life, and subject thereto the income was to be paid to Mrs. Smith for her separate use without power of anticipation. With regard to the capital a general power of appointment was given her as to 25,000*l.*, and a special power of appointment of the residue among her eight children.

By a deed of even date some property of the intended husband was settled in favour of himself and the wife and the children of their marriage.

(1) [1895] 1 Q. B. 472.

The marriage was duly solemnized. The company was formed in June, 1890, and the 15,500 fully paid-up shares were duly allotted in manner mentioned in the settlement.

On August 2, 1890, the wife died, having exercised in favour of her eight children both the powers of appointment given to her by the settlement.

The question in dispute was whether account duty under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12, s. 38, sub-s. 1, sub-s. 2 (*a*) (*c*)), and the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7, s. 11), was payable (1.) by the adult sons on the 1000 shares each allotted to them; (2.) by the trustees on the value of the 15,500 shares allotted to them, after deducting the 25,000*l.* on which probate duty was paid as part of the settlor's estate, and deducting the amount invested to secure the annuity of 1000*l.* during the life of the husband.

The Divisional Court decided that account duty was not payable on any of the above descriptions of property. (1)

Sir R. T. Reid, A.-G., and *Vaughan Hawkins*, for the Crown. Account duty is payable on the 4000 shares given to the adult sons, and on the 3200 shares settled in trust for the infant sons and married daughters under 44 & 45 Vict. c. 12, s. 38, sub-s. 2 (*a*), they being immediate gifts under a voluntary disposition made less than twelve months before the death of the deceased. And it is also payable on the 12,300 shares forming the wife's trust fund under sub-s. 2 (*c*); they being the subject of a voluntary settlement whereby a life interest is reserved to the donor.

The real question in both these cases is whether the children of the settlor by her former marriage were volunteers within the meaning of the Act. The respondents rely on *Newstead* v. *Searles* (2), which was considered by Lord Selborne in *Mackie* v. *Herbertson*. (3) In that case a settlement by a widow, who was about to marry again, in favour of the children of her former marriage, was upheld against subsequent mortgagees on the ground

(1) [1895] 1 Q. B. 472.

(2) 1 Atk. 265.

(3) 9 App. Cas. 303.

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that a provision for the children of the former marriage was not voluntary or fraudulent under the statute 27 Eliz. c. 4. But that authority is only binding in cases under that statute, and has never been held to decide that children of a former marriage are within the consideration of a settlement on a second marriage. The cases under the Statute of Elizabeth have been decided on special grounds, and the Courts have been anxious to prevent injustice being done by that statute. But in dealing with cases under the Revenue Acts the word "volunteer" must be construed according to its ordinary meaning of a person who has given no consideration: *Johnson* v. *Legard* (1); *Clayton* v. *Wilton* (2); *Sutton* v. *Chetwynd* (3); *Price* v. *Jenkins* (4); *De Mestre* v. *West* (5); *In re Cameron and Wells* (6); *Gale* v. *Gale* (7); *Heap* v. *Tonge*. (8)

Jelf, *Q.C.*, and *Micklem*, for the defendants. The children of the settlor's former marriage were not volunteers within the meaning of s. 38 of the Revenue Act, 1881. There is no definition of volunteers in the Act, and the word must be taken as it was construed in Courts of Equity when the Act was passed. *Newstead* v. *Searles* (9) has always been acted upon, and it has been considered as taking children of a former marriage out of the category of volunteers. It is not correct to say that all are volunteers who do not give consideration for the settlement; for the children of an impending marriage give no consideration, and yet they are within the consideration of the settlement, and can enforce it. So the interest of the children of a former marriage forms part of the bargain under which a widow or widower makes a settlement on a second marriage. The Crown is obliged to admit that they are not volunteers in one sense, and, if so, there is no reason for holding them to be volunteers under the Act. In *Clarke* v. *Wright* (10) *Newstead* v. *Searles* (9) was followed, and also in *Gale* v. *Gale*. (7) *Ex parte Marsh* (11)

(1) 6 M. & S. 60; 3 Madd. 283; T. & R. 281.
(2) 6 M. & S. 67, n.
(3) 3 Mer. 249.
(4) 4 Ch. D. 483.
(5) [1891] A. C. 264.
(6) 37 Ch. D. 32.
(7) 6 Ch. D. 144.
(8) 9 Hare, 90, 104.
(9) 1 Atk. 265.
(10) 6 H. & N. 849.
(11) 1 Atk. 158.

carries out the principle of *Newstead* v. *Searles* (1), that the children of the wife's former marriage were not volunteers.

[LINDLEY L.J. They took as appointees of the wife, who was within the marriage consideration.]

In *Rook* v. *Dale* (2) the same principle as in *Newstead* v. *Searles* (1) was acted on. In *Cotton* v. *King* (3) an ante-nuptial settlement by a wife on her children by a former marriage is treated as not voluntary. In *Clarke* v. *Wright* (4) the Exchequer Chamber held children of the wife by a former marriage not to be volunteers, and in *Gale* v. *Gale* (5) an executory settlement was enforced by the Court at their suit. The observations of Lord Selborne in *Mackie* v. *Herbertson* (6) and *De Mestre* v. *West* (7) were extrajudicial dicta, and *Gale* v. *Gale* (5) was not brought to Lord Selborne's notice. In the first of those two cases the decision was in favour of the children of the first marriage; the other was an attempt to extend the doctrine of *Newstead* v. *Searles* (1) to illegitimate children.

Vaughan Hawkins, in reply. *Gale* v. *Gale* (5) went further than any former case, and looking at the other cases on the subject, it is of doubtful authority. The question here is whether the principle established or supposed to be established by *Newstead* v. *Searles* (1) is to be applied in construing a revenue Act. It is an Act of the United Kingdom, and should be interpreted in such a way as to produce uniformity on the two sides of the border: *Saltoun* v. *Advocate-General.* (8)

LINDLEY L.J. The question before us is whether, upon the true construction of the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, what is called account duty is payable in respect of the shares which are the subject of the marriage settlement of March 18, 1890. I shall not enter into the details of that settlement; it is enough to say that 4000 shares are given to sons of the lady making the settlement, and the rest are given to trustees

(1) 1 Atk. 265.
(2) May on Fraudulent Conveyances, Appendix 13.
(3) 2 P. Wms. 358, 674.
(4) 6 H. & N. 849.
(5) 6 Ch. D. 144.
(6) 9 App. Cas. 303.
(7) [1891] A. C. 264.
(8) 3 Macq. 659, 671, 678.

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as to 1000 upon trust for an infant son of hers; another 1000 upon trust for another infant son; 600 were to be settled upon a daughter and her issue; 600 upon another daughter and her issue. These 7200 shares are not made subject to any preceding life estate, and I shall treat them for the present purpose as one fund. The residue of the shares are to be held in trust to pay an annuity to the husband, and subject thereto the income is given to the settlor for life, and after her death the capital is to go as to a certain sum as she shall appoint, and as to the residue among her children by her former marriage as she shall appoint. The settlor having died within twelve months after the settlement, the question is whether account duty is payable or not by the children of the first marriage, on both or either of the two classes of property.

As to the property given to the children of the first marriage, without the intervention of a previous life estate, account duty is claimed under the Act of 1881, s. 38, on the ground that the property is "taken under a voluntary disposition made by any person so dying [i.e., on or after June 1, 1881], purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been bonâ fide made three months before the death of the deceased." This period of three months was extended to twelve by the Act of 1889.

I do not see on what principle we can say that the first class of shares were not the subject of such a voluntary disposition as is mentioned in the clause I have read. The respondent's counsel have contended that "voluntary disposition" means a voluntary settlement or voluntary instrument, but it strikes me that the word disposition is used in a large sense; and whether the disposition, if voluntary, is contained in a marriage settlement, and whether it is or is not mixed up with any other disposition, appears to me immaterial. The first class of shares are taken under a voluntary disposition, by way of gift to the children of the first marriage.

I confess I do not quite follow what appears to have been the difficulty of the learned judges in the Court below on this point. Wright J. says: "That question arises, in the first place, on the

two items of 4000 shares and 3200 shares. In respect of this the marriage settlement did not, in my judgment, purport to operate as 'an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise,' because it was, as I read it, a mere ordinary settlement giving a life estate to the intended wife, and in the events which have happened to particular persons." The learned judge appears to treat the whole as subject to the life estate of the wife, in which case it would not come under sub-s. 2 (*a*) of s. 38, but under sub-s. 2 (*c*). I can only regard the disposition of those shares as a disposition of them by way of voluntary gift.

We now come to the bulk of the property, in which a life interest is given to the wife. This does not come within sub-s. (*a*), because the gift is not immediate, but within sub-s. (*c*). That sub-section makes subject to the duty "Any property passing under any past or future voluntary settlement made by any person dying on or after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life, or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property." The important words there are "any past or future voluntary settlement." If the case had stood there probably the property would not have come within the sub-section on the ground that the settlement was not a voluntary one. To meet the difficulty arising from those words it is provided by the Act of 1889 that "the description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer; and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person." So that now what is hit at is not merely voluntary settlements, but dispositions in favour of volunteers contained in settlements which are not voluntary.

Then arises the question what is meant by a volunteer. Upon

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that point we have had cases cited to us covering the last half century; but no precise definition of the term has ever been given. The cases cited were cases in which the point arose between persons claiming under settlements and persons claiming under the Statute 27 Eliz. c. 4. It is said that anybody who can take under a settlement without being overridden by a subsequent purchaser for value is not a volunteer, and that inasmuch as *Newstead* v. *Searles* (1) and some other cases shew that the children of the first marriage of a lady who makes a settlement upon them, are not volunteers so as to be overridden by subsequent purchasers for value, they are not volunteers at all. We have attended to the numerous authorities cited, and we have considered what effect is to be given to them, and I say at once that nothing which will fall from me is intended to throw the slightest doubt upon the propriety of the decision in *Newstead* v. *Searles* (1) or any of the other cases which have been decided upon the question of the true construction of the Statute of 27 Eliz. c. 4. That statute we all know was so worded as to give rise to difficulties, and it was held very early that all voluntary settlements, however bonâ fide, were null and void as against purchasers for value even with notice of those voluntary settlements. How the Courts came to that conclusion, which seems startling, we need not investigate. The only use of those cases on the present occasion is to throw light upon the meaning of the term "volunteer." I have listened to the arguments upon them, and I do not think it is easy to deduce from them any one general proposition which would be consistent with the whole of them. Some of the decisions are very difficult to reconcile with each other, some of them, indeed, are to my mind irreconcilable; but there is one feature which appears to me to be common to the whole of them, namely, that the consideration of marriage extends only to the husband and wife and the children of that marriage, and that all other persons whether they are children of a former marriage or children of a subsequent marriage, or whether they are brothers, or whether they are illegitimate children, or whether they are strangers altogether, are volunteers in some sense. But there are cases, of which

(1) 1 Atk. 265.

Newstead v. *Searles* (1) is one, to the effect that children of a first marriage may not be volunteers in such a sense that the limitation to them is necessarily invalid in favour of a purchaser for value under the Statute of 27 Eliz. c. 4. I do not think you can read *Newstead* v. *Searles* (1) or any other case as going the whole length of saying that those persons to whom I have alluded are not volunteers. They are volunteers, but not liable to be defeated under the Statute of 27 Eliz. c. 4. The Revenue Act with which we are now dealing has nothing to do with that question. What we have to do now is to construe an Act of Parliament passed for the whole of the United Kingdom and to say whether the respondents are volunteers hit by that Act. This question cannot be decided by *Newstead* v. *Searles* (1), *Gale* v. *Gale* (2), *Clarke* v. *Wright* (3), and other cases of that class. The case which goes furthest is *Gale* v. *Gale* (2), because all the other cases which have been referred to, and which I will run over shortly in a moment, were cases in which the question was discussed solely with reference to the Statute of 27 Eliz., but *Gale* v. *Gale* (2) was not. In *Gale* v. *Gale* (2), Fry J., as he then was, held that the children of a lady by her first marriage, who were volunteers, and he treats them so, could nevertheless enforce a covenant contained in that marriage settlement against persons claiming under the will of the settlor. He in effect said: "Although you are volunteers yet, having regard to the decision in *Newstead* v. *Searles* (1), you are volunteers of an exceptional kind, you are volunteers in favour of whom the Court will execute an imperfect gift." Whether he went too far in that respect I do not know. I must say I feel great difficulty in following him, and he certainly went far beyond *Newstead* v. *Searles* (1) which only decided that such persons, taking under the settlement there in question to which I will presently refer more particularly, were not to be overridden under the Statute 27 Eliz. by a subsequent conveyance to a purchaser.

I shall not dwell at any length on these cases. I will merely state very shortly that with reference to the statute of 27 Eliz. strangers taking under a settlement have been held not protected

(1) 1 Atk. 265. (2) 6 Ch. D. 144.
(3) 6 H. & N. 849.

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and to be volunteers and to be overridden by a sale: *Sutton* v. *Chetwynd*. (1) The settlor's brother was held to be in the same position: *Johnson* v. *Legard*. (2) The husband's children by a former marriage were held to be in a similar position: *Price* v. *Jenkins* (3) and *In re Cameron and Wells*. (4) The existing illegitimate children of the husband and wife were held not to be protected: *De Mestre* v. *West*. (5) On the other hand, the wife's children or grandchildren of a former marriage were held not to be volunteers for that purpose in *Newstead* v. *Searles* (6) and *Gale* v. *Gale*. (7)

Now the ratio decidendi of *Newstead* v. *Searles* (6) has been discussed from various points of view ever since I knew anything of this branch of the law. It is impossible to read Lord Hardwicke's decision without seeing that he laid considerable stress upon what he called reciprocal considerations. And what he meant was put into more explicit language by Hall V.C. in *Price* v. *Jenkins* (8), and afterwards by Lord Selborne in the House of Lords in *Mackie* v. *Herbertson* (9) and in the Privy Council in *De Mestre* v. *West*. (5) I am disposed to think that the true view of *Newstead* v. *Searles* (6) is that which is there pointed out—namely, that, although the children by the first marriage were volunteers, a gift to them would not be defeated by a conveyance to a purchaser when the gift to them was so mixed up with a gift to non-volunteers as to be incapable of being separately held invalid. That I believe to be the true solution. Be that as it may, I do not think that there is any case, certainly not the case in the Exchequer Chamber of *Clarke* v. *Wright* (10), which is adverse to the children of the first marriage being volunteers.

We must look at this matter, I think, apart from all technicalities. We have to construe an enactment relating to volunteers in an Act applicable to the whole of the United Kingdom. The whole question we have to consider is, what is a volunteer? Having regard to the general understanding of what is meant

(1) 3 Mer. 249.
(2) 3 Madd. 283; 6 M. & S. 60.
(3) 4 Ch. D. 483.
(4) 37 Ch. D. 32.
(5) [1891] A. C. 264.
(6) 1 Atk. 265.
(7) 6 Ch. D. 144.
(8) 4 Ch. D. 483, 488.
(9) 9 App. Cas. 303.
(10) 6 H. & N. 849.

by that expression, I am of opinion that these children are volunteers and are liable to this duty.

LOPES L.J. This is a matter with regard to voluntary settlements and volunteers with which I need scarcely say I am not so familiar as my learned brethren and I shall content myself with expressing very shortly the conclusion at which I have arrived. The question to be decided is this: whether the children of Mrs. Smith by a former husband are volunteers within the meaning of the Revenue Acts of 1881 and 1889. The question, as was observed by the learned counsel for the respondents, is almost academic—as the Estate Duty Act of last year has superseded the sections with which we are now dealing, and nothing in that later Act turns on the expression "volunteer."

The conclusion I have arrived at is that the consideration of marriage only covers the husband and wife, and the issue of that particular marriage in respect of which the consideration passes, and does not extend to any one else. So that in effect all but the husband and wife in question and their issue are volunteers.

In order to determine the meaning of the word "volunteers" many cases have been cited to us, particularly the case of *Newstead* v. *Searles*. (1) Now that case, it is to be observed, was a decision in respect of the statute of the 27 Eliz. c. 4. And another case upon which great reliance was placed by the respondents (*Clarke* v. *Wright* (2)) was again a decision upon that statute. Certainly I should have great difficulty indeed in getting over the effect of those decisions if it had not been for what was said by Lord Selborne in two cases to which reference has been made, namely, *Mackie* v. *Herbertson* (3) in the House of Lords and *De Mestre* v. *West* (4) in the Privy Council. It appears to me that Lord Selborne in those two cases has given a satisfactory explanation of the decision in *Newstead* v. *Searles*. (1) He accounts for it by saying that in that case the limitations in favour of the children of the former marriage and the children of the second marriage were so complicated and mixed up, and they were so much dealt with together as a class, that it

(1) 1 Atk. 265.
(2) 6 H. & N. 849.
(3) 9 App. Cas. 303.
(4) [1891] A. C. 264.

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impossible to give effect to the limitations in favour of the one without giving effect to the limitations in favour of the other. I felt at one time that these remarks might be said to be mere dicta, but when I come to look carefully at the judgments of Lord Hardwicke in *Newstead* v. *Searles* (1) I find expressions by him which to my mind give colour to the explanation put upon that case by Lord Selborne. I think, therefore, that the difficulty arising from the decision in *Newstead* v. *Searles* (1) and other cases, especially *Clarke* v. *Wright* (2), is removed.

Another case was cited to us upon which much reliance was placed—the decision of Fry J., in *Gale* v. *Gale* (3)—and it appeared to me to be the strongest case that the respondents had to rely upon. But when that case is carefully analyzed, it appears to me that it does not in any way prevent our putting the construction we propose to put upon the word "volunteer," for I find in that case that Fry J. says that these children are volunteers, but that they come within the exception in favour of volunteers, and, although volunteers, are entitled on the ground of that exception to enforce performance of the covenant contained in the marriage settlement against persons claiming under the will of the settlor.

In the result, therefore, I have arrived at the conclusion that the Crown is entitled to succeed, and that this appeal ought to be allowed.

KAY L.J. The question that we have to determine is what is the meaning of the words "voluntary disposition" in the Revenue Act of 1881, and the word "volunteer" in the Revenue Act of 1889. That question depends upon what was the accepted meaning of those words at law and in equity at the time those statutes respectively were passed.

The claim in this case is for account duty under the Revenue Act of 1881 upon provisions made in an ante-nuptial marriage settlement in favour of the children of the lady by a former marriage. The first question is whether limitations made directly in favour of the children of the former marriage, without the

(1) 1 Atk. 265.

(2) 6 H. & N. 849.

(3) 6 Ch. D. 144.

interposition of a previous life estate, come within s. 38, sub-s. 2, of the Act of 1881. They do not come within s. 38, sub-s. 2 (*c*), or the section in the Act of 1889 explaining it, because that is confined to the case of a settlement in which there is a previous life interest given, and these provisions were given directly to the children of the former marriage. It was argued by Mr. Jelf and Mr. Micklem, chiefly by Mr. Micklem, that they do not come within s. 38, sub-s. 2 (*a*), because these dispositions, being contained in an ante-nuptial marriage settlement, which of course was a settlement for ample value as between husband and wife, cannot be considered voluntary dispositions. I confess I am quite unable to follow that argument. Sub-s. 2 (*c*) applies to voluntary settlements in which there was a previous life interest given to one of the settlors. Sub-s. 2 (*a*) applies to any "voluntary disposition" whatever, not saying whether it is in a settlement or not, but it includes a voluntary disposition in a settlement in which there is no previous life interest given, because it contemplates that a voluntary disposition may be made amongst other things by a declaration of trust, and as it does not say by a verbal declaration of trust only, it must be taken to mean a declaration of trust whether verbal or contained in a settlement. Here we have distinctly a declaration of trust in the settlement, which settlement as between the settlors was for valuable consideration; but the provisions which I am now considering being in favour of the children of the lady by a former marriage clearly did not come within the marriage consideration. The disposition in their favour was therefore a voluntary disposition.

The other question arises under a limitation after a previous life interest to the settlors or one of them in favour of the children of the lady by a former marriage. Are they or are they not "volunteers"?

Now, what in the ordinary course of things the marriage consideration covers has been decided again and again. It covers primâ facie the husband and the wife and the issue of that marriage, and any limitation in favour of any one of those persons comes within the marriage consideration. That is to say they are all treated for every purpose of the settlement as

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though a consideration moved from each one of them. But it has often been decided that primâ facie persons to whom property is limited directly or by way of remainder in an antenuptial settlement other than the husband, the wife, and the issue of the marriage, are not within the marriage consideration, and although the limitation to them is in a settlement which as between the settlors is made for the most valuable consideration imaginable, that of marriage, they nevertheless for some purposes, if not for all purposes, are to be treated as volunteers. Undoubtedly primâ facie that would apply to children of either of the settlors by a former marriage, and the course of the decisions shews that it would certainly apply to children of the husband by a former marriage. But it is said that there is an exception in the case of children of the wife or intended wife by a former marriage, and that if they are included in the settlement they are not volunteers: *Newstead* v. *Searles*. (1) Judges have remarked upon that as being a very extraordinary exception, and have doubted it and felt great difficulty in ascertaining the reason of it. But we now have an authoritative explanation of the decision in *Newstead* v. *Searles* (1) by one of the greatest masters of equity who have ever lived in our time, if not in any time, the late Lord Selborne, who after a careful consideration of all the authorities came to the conclusion to which I am going to refer.

In the first place, I observe that in *Newstead* v. *Searles* (1) we find that Lord Hardwicke, in dealing with the question whether the children of the lady in that case by a former marriage were persons in whose favour the settlement could be enforced or not, says this: "The children of the first marriage"—he means the first marriage of the lady—"stand in the very same plight and condition as the issue would have done, if there had been any, of the second marriage"—the marriage in contemplation of which the settlement was made—"and even are provided for before them. Supposing there had been issue of the second marriage, and they had brought their bill to carry these articles into execution, upon a decree in their favour, would not the children of the first marriage have been equally

(1) 1 Atk. 265.

entitled to a benefit from the decree?" I do not lose sight of the fact that in the other part of the judgment he treats the children of the first marriage as not being volunteers, and uses language which would seem to imply that the settlement, even as far as they were concerned, could not be treated as a voluntary settlement, but he gives what I have just read as one of the reasons for his decision. When that decision came to be considered in the House of Lords by Lord Selborne in the case of *Mackie* v. *Herbertson* (1), he says (p. 336): "I do not think that I need make any further observation upon the case"—that is another case he had been referring to—" beyond this, that if any English authorities were fit to be regarded in a question of this kind as to what is and what is not within the considerations of the contract, the cases of *Newstead* v. *Searles* (2) and *Clayton* v. *Wilton* (3) would be very much to the purpose. *Newstead* v. *Searles* (2) was a case of this kind—there was a marriage contract, and there was a gift in remainder to the existing children of a former marriage, subject to letting in those who might afterwards be born of the intended marriage; and when they came into existence the state of things would be such as we have here. Upon those circumstances Lord Hardwicke, a very great judge, entertained no doubt that the considerations of the contract included the earlier children, because their interests and those of the children of the marriage which afterwards took place were so dealt with, that the stipulations for those children who were within the marriage consideration were made dependent upon the agreement that the others should take as they did. The children within the consideration were to take upon certain terms, and without giving them either more or less than that which the contract gave them, it was impossible to disappoint the others. Exactly the same was the principle of the case of *Clayton* v. *Wilton* (3), though the form in which the question was raised was different, because it was a limitation by way of remainder occurring after a gift to male issue who were within the consideration of marriage, and before another gift to female issue in the like situation." That is a construction

(1) 9 App. Cas. 303.
(2) 1 Atk. 265.
(3) 3 Madd. 302.

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of the decision of Lord Hardwicke in *Newstead* v. *Searles* (1) which makes it perfectly consistent with all the other cases on the subject of volunteers in a marriage settlement. According to that, the children of the wife by a former marriage were volunteers, but because their interests were so complicated and mixed up with the interests of the possible issue of the marriage then contemplated that they could not well be separated, they were treated as persons who were entitled to come to the Court to have the articles of settlement enforced, and were treated as being brought in that way within the marriage consideration or at least entitled to have the benefit of it, because otherwise the settlement would be or might be defeated, even as to the children of the contemplated marriage, who were undoubtedly within the marriage consideration.

The point had previously come before Hall V.-C. in *Price* v. *Jenkins* (2), and he had taken the same view of *Newstead* v. *Searles* (1), and given a similar explanation. In 1891, in the case of *De Mestre* v. *West* (3) in the Privy Council, Lord Selborne again had to consider the case of *Newstead* v. *Searles*. (1) In the meantime the point had come before me in the case of *In re Cameron and Wells* (4), and I had the presumption to say that the explanation given by Lord Selborne was a very ingenious one, but that I could not quite reconcile it with all the language used by Lord Hardwicke in *Newstead* v. *Searles*. (1) Lord Selborne, in *De Mestre* v. *West* (3), referred to *Price* v. *Jenkins* (2) and to *In re Cameron and Wells* (4), in which it was attempted to extend the supposed doctrine of *Newstead* v. *Searles* (1) to the children of the husband by a former marriage, and I declined to carry it any further. He then says this: [The Lord Justice here read Lord Selborne's judgment from the foot of p. 267 to the close of the paragraph ending on p. 270] and he then proceeds to shew that there was not enough in the case before the Court to bring it within *Newstead* v. *Searles* (1) as thus understood.

We have, then, two authoritative explanations of the real grounds of *Newstead* v. *Searles* (1), given by no less an authority than Lord Selborne, after it had been canvassed in the inter-

(1) 1 Atk. 265.
(2) 4 Ch. D. 483.
(3) [1891] A. C. 264.
(4) 37 Ch. D. 32.

mediate cases to which reference was made, and I cannot for a moment doubt that if the question what was the meaning of and what was in fact the decision in *Newstead* v. *Searles* (1) should now come before the House of Lords, they would follow the view expressed by Lord Selborne in *Mackie* v. *Herbertson* (2), and repeated by him in *De Mestre* v. *West.* (3) If so, it would be idle for this Court to hold that Lord Hardwicke did not mean that which Lord Selborne says that he meant, that the decision was not upon the ground on which Lord Selborne puts it, but that it was a decision that children of the wife by a former marriage come within the marriage consideration of a settlement made upon a subsequent marriage. If so, this case is completely determined, because at the time these revenue Acts were passed the children of the former marriage of the intended wife were not within the marriage consideration of the settlement then to be made, but were volunteers, which is the word used in the second Act explaining sub-s. 2 (*c*) in the first Act, and are liable to duty in respect of the property in which they took a reversionary interest: and as to the property of which there was an immediate gift to them, the disposition in their favour by the settlement was a voluntary disposition within the meaning of sub-s. 2 (*a*) of the first Act.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Tarry, Sherlock, & King, for Blyth, Norwich.*

(1) 1 Atk. 265. (2) 9 App. Cas. 303.
(3) [1891] A. C. 264.

H. C. J.

C. A.
1895
June 26;
July 19.

[IN THE COURT OF APPEAL.]

HOWORTH *v.* SUTCLIFFE.

Practice—Costs—Action of Tort—Question of Title—County Court, Jurisdiction of—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 56, 60, 116.

The plaintiff sued in the High Court for damage to his reversion by reason of the defendant's interference with the flow of water through a pipe under the defendant's land to which the plaintiff claimed to be entitled in respect of his premises. The defendant by his defence refused to admit the plaintiff's title to the easement claimed, pleaded leave and licence from the plaintiff's tenant, and, while denying liability, brought 40*s.* into court. The plaintiff took the 40*s.* out of court in satisfaction of his claim. The yearly value of the premises in respect of which the easement was claimed exceeded 50*l.* :—

Held, that the action could not have been commenced in the county court, because a question of title to a hereditament arose which that Court had no jurisdiction to try; and that, therefore, the plaintiff, although he had recovered less than 10*l.* in an action of tort, was entitled to his costs of the action, notwithstanding the provisions of the County Courts Act, 1888, s. 116.

Appeal from an order of Pollock B.

The facts were as follows:—

In an action brought in the High Court the plaintiff in his statement of claim alleged that he was owner in fee simple of a mill and public-house at Todmorden, in the county of York, which were in the occupation of his tenants, and was also the owner of a pipe running in part through land of the defendant and under a building of the defendant, and was entitled to the flow and the exclusive use and benefit of a stream of water conveyed along the said pipe to his premises, for the use in succession of the tenants and occupiers of the public-house and of the tenants and occupiers of the mill; that the defendant in the year 1878 secretly and wrongfully broke and stopped the said pipe, and diverted the water conveyed along the same, and in the year 1882 secretly and wrongfully made a further break in the pipe, and further diverted the water conveyed along the same at another point; that the defendant had continued to

divert the water as aforesaid; and that the plaintiff's reversion in his premises was thereby damaged; and the plaintiff claimed damages and an injunction.

The defendant in his statement of defence refused to admit the plaintiff's title to the premises mentioned in the statement of claim and to the pipe and flow of water therein mentioned. He further alleged that in 1882, by arrangement with one Barraclough, who was then the occupier and lessee of the public-house, he diverted water from the pipe to supply his stable, but that that diversion was discontinued in 1894 during the continuance of Barraclough's lease, and that he never had since then any intention of renewing such supply; and, save as aforesaid, he denied the commission by him of the acts complained of. He also, while denying liability, brought into court 40*s.*, and said that that sum was sufficient to satisfy the plaintiff's claim.

The plaintiff took the 40*s.* out of court in satisfaction of his claim, and then applied to a master to tax his costs of the action. The master declined to do so on the ground that the plaintiff had recovered less than 10*l.* in an action of tort which could have been commenced in the county court. On appeal to the judge at chambers, he affirmed the decision of the master, but gave leave to appeal. It was admitted that the yearly value of the hereditaments in respect of which the easement was claimed exceeded 50*l.* (1)

(1) County Courts Act, 1888, s. 56: "All personal actions where the debt, demand, or damage claimed is not more than fifty pounds, whether on balance of account or otherwise, may be commenced in the court; and all such actions shall be heard and determined in a summary way according to the provisions of this Act: Provided always that, except as in this Act provided, the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or for any libel or slander, or for seduction, or breach of promise of marriage."

Sect. 60: "A judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of fifty pounds by the year, or in case of an easement or licence, where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on,

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Scott Fox, for the plaintiff. This was not an action which could have been commenced in the county court, because a question of title to hereditaments was necessarily involved, which under ss. 56 and 60 of the County Courts Act, 1888, the county court would have had no jurisdiction to try. This is not like an action of trespass in which mere possession may support the action, and no question of title may be involved. The plaintiff must at the trial have proved his title to the easement claimed over the defendant's land; which the defendant had put in issue.

[He cited *Williams* v. *Jones* (1) and *Hawkins* v. *Rutter*. (2)]

C. A. Russell, for the defendant. The action could have been commenced in the county court. The question whether the title to hereditaments is involved, so as to prevent the county court from having jurisdiction, does not depend upon the allegations contained in the pleadings. It is not sufficient that upon the pleadings a question of title may possibly arise. The question whether the county court has jurisdiction depends upon the question whether in fact a dispute as to the title arises. The jurisdiction of the county court is not ousted, and the county court judge is bound to proceed, until it appears on the evidence that a question of title actually arises: *Latham* v. *Spedding* (3); *Mountnoy* v. *Collier* (4); *In re Emery* v. *Barnett*. (5) Here it

through, over, or under which such easement or licence is claimed, shall exceed the sum of fifty pounds by the year."

Sect. 116: "With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply:—(2.) If in an action founded on tort the plaintiff shall recover a sum less than ten pounds, he shall not be entitled to any costs of the action; and, if he shall recover a sum of ten pounds or upwards, but less than twenty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court: unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court or a judge thereof at chambers shall by order allow costs."

(1) 15 L. T. 248.
(2) [1892] 1 Q. B. 667.
(3) 17 Q. B. 440.
(4) 1 E. & B. 630.
(5) 4 C. B. (N.S.) 423.

is obvious that there was really no dispute as to the title, because the plaintiff took out the 40*s.* paid into Court.

[He also cited *Timothy* v. *Farmer*. (1)]

Cur. adv. vult.

July 19. KAY L.J. read the following judgment:—

The master in this case declined to tax the plaintiff's costs of the action on the ground that the action was for a tort, and that the plaintiff only recovered 2*l.* damages. Pollock B. has agreed with the master, but gave leave to appeal.

If the action was improperly brought in the High Court, this decision is right. It was an action by one who claimed to be owner in fee simple of a mill and public-house situate at Todmorden, in the county of York, and also claimed to be owner of a pipe passing through the defendant's land, and to be entitled to the flow of water through it exclusively. The alleged tort was that the defendant had diverted the water from this pipe in his own land. It was argued that this is not like an ordinary action of trespass in which occupation of the tenement is all that need be proved, the title not coming at all in question. The plaintiff was not in occupation. His tenant was; and the plaintiff sued for injury to his reversion. Unless the defendant admitted it, the plaintiff, it was argued, would be obliged to prove his title to the pipe and flow of water through the defendant's land. In fact, the defendant by his pleading refused to admit this; but he said that he had diverted the water with the consent of the occupier of the public-house, and that such diversion had since been discontinued during the lease under which such occupier held, and he never intended to renew it; and the defendant, denying liability, paid into court 40*s.* The plaintiff was satisfied with this. He took the 40*s.* out of court, and applied to have his costs of the action taxed. Reference is made to the County Courts Act, 1888, ss. 56, 60, 116, and to various cases, which I will proceed to consider, premising only that it seems to me important to put, if possible, such a construction upon the Act as will enable a plaintiff to judge, when he brings his action, whether he should bring it in

(1) 7 C. B. 814.

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the High Court or in the county court. Sect. 56 of the County Courts Act, 1888, provides that actions for a debt, demand, or damage not exceeding 50*l.* may be commenced in a county court, provided, amongst other things, the title to any corporeal or incorporeal hereditaments shall not be in question, unless, by s. 60, the annual value of such hereditaments shall not be more than 50*l.* a year, or, in the case of an easement, the value of the hereditaments in respect of which or over which the easement is claimed shall not exceed that annual sum. Then s. 116 provides that, if in an action of tort brought in the High Court which could have been commenced in a county court the plaintiff recovers less than 10*l.*, he is not to have any costs, unless, amongst other things, the High Court allows costs. In *Sewell* v. *Jones* (1) the action was to recover damages for trespass. A motion was made for a prohibition by the defendant on the ground that the land on which the alleged trespass was committed belonged to him, and the rule for a prohibition was made absolute. In *Latham* v. *Spedding* (2) it was held that in an action of trespass a plea of not possessed did not raise a question of title. In *Mountnoy* v. *Collier* (3) a tenant, in answer to an action for use and occupation, sought to prove that before the time referred to his landlord's title had expired, and it was held that this did put the plaintiff's title in question. In *In re Emery* v. *Barnett* (4), in an action for rent, the defendant had left the premises, and it was held that, if he left voluntarily, no question of title was raised, but otherwise if he was ejected by title paramount. In *Williams* v. *Jones* (5) the defendant, in answer to an action for removing stone from the plaintiff's land, set up an inclosure Act, by which he alleged the stone was reserved to him. This, it was held, raised a question of title. In *Hawkins* v. *Rutter* (6) it was held that, in an ordinary action for trespass where possession only need be proved by the plaintiff, his title does not come in question; and it was further decided that the easement referred to in the County Courts Act, 1888, s. 60, did not apply to a public right of way, but only to an easement where there is a

(1) 19 L. J. (N.S.) (Q.B.) 372.
(2) 17 Q. B. 440.
(3) 1 E. & B. 630.
(4) 4 C. B. (N.S.) 423.
(5) 15 L. T. 248.
(6) [1892] 1 Q. B. 668.

dominant and servient tenement and the value of either did not exceed 50*l.* a year.

If this were a simple action of trespass in which the plaintiff need only allege and prove possession, his title would not come in question, even if the defendant pleaded that the plaintiff was not possessed. In such an action the title would only come in question if the defendant set up a title in himself to the locus in quo. The plaintiff here sues for injury to his reversion; and the defendant sets up a right to take the water by agreement with a former tenant of the plaintiff. That raises at once the question whether such agreement was binding on the plaintiff—in other words, whether by such an agreement the defendant acquired a title against him; and this is clearly a question of title, which, if the plaintiff had not accepted the forty shillings, must have been decided at the trial. I think, therefore, that on these pleadings the plaintiff's title was put in question, and that the case could not be tried in a county court, and that the plaintiff is therefore entitled to the costs of the action.

A. L. SMITH L.J. read the following judgment:—

The question is whether this action, which has been brought in the High Court, could within the meaning of s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), have been commenced in a county court; for, if it could, it being an action of tort, and the plaintiff having recovered only 40*s.*, he is not entitled to any costs; whereas, if the action could not have been commenced in a county court, the plaintiff is entitled to costs and to have them taxed against the defendant. As I understand the Act and the cases thereon, the law as to whether an action brought in the High Court could have been commenced in a county court depends upon whether, if the action were brought and tried in a county court, the title to a corporeal or incorporeal hereditament exceeding in value 50*l.* by the year would in reality come in question. If it would, then the action could not have been commenced in a county court within the meaning of the section, for by ss. 56 and 60 the county court would have no jurisdiction to try it. It is agreed that in this case the value of the hereditaments exceeded 50*l.* by the year; but it was argued for

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the defendant that no title to any hereditament in reality came in question.

It has been held—and in this I agree—that the mere assertion by the plaintiff of title to a hereditament of over 50*l.* in value by the year is not sufficient to shew that the action could not have been commenced in the county court; but, in order to shew that the plaintiff could not sue in the county court, he must establish the fact that a question of title did really and bonâ fide come in issue; not merely that the defendant had so pleaded that it possibly might do so, but that it in reality must do so: *Latham* v. *Spedding*. (1) Now the plaintiff's case is that, at the time of the committing by the defendant of the wrongs complained of, the plaintiff was owner in fee of a mill and of a pipe connected therewith which was situated under the defendant's land, and as such owner was entitled to the exclusive use of the water conveyed by that pipe to his mill for the use of his tenants, and that in the years 1878 and 1882 the defendant secretly and wrongfully bored into the pipe and tapped the water running therein, whereby the plaintiff's title to the pipe and to the exclusive use of the water running therein has been interfered with, and his reversion in the mill had been injured. All these allegations are put in issue by the defendant; and in addition he sets up a leave and licence by the plaintiff's tenants to him to do what is complained of, and he also, but without admitting liability, pays 40*s.* into court. The question is: Could the plaintiff succeed in this action by mere proof that he was, when the wrongful acts were committed, in possession of the mill by his tenants who were then enjoying the use of the water? If such proof would suffice, I should hold again, as I did in *Hawkins* v. *Rutter* (2), that title to a hereditament did not come into question within the meaning of the section. But would it suffice? Suppose the plaintiff went to trial merely proving that he was in possession of the mill by his tenants, who were enjoying the water, how would that prove that the pipe under the defendant's land was the plaintiff's property, and that the defendant was in the wrong in boring into the pipe which was upon his own land? It would prove nothing of the kind; and, in my judgment, if the plaintiff

(1) 17 Q. B. 440. (2) [1892] 1 Q. B. 668.

proved nothing more than possession of the mill, he ought to be non-suited. It should be observed that the plaintiff could never prove that he or his tenants were in possession of the pipe, for this was under the defendant's land, and not in his possession or that of his tenants. As the plaintiff cannot establish his case by proving a mere possessory title, I am of opinion that he must go further, and prove what is his title to the mill and the pipe. This being disputed, the title to a hereditament within the meaning of the Act must come in question.

It is true that the plaintiff has taken out of court the 40*s.* paid in by the defendant, with a traverse of the plaintiff's title, as adequate damages for the loss he has sustained by the alleged wrongful acts of the defendant; but how does this make the action one which could have been commenced in the county court? Had it been tried there, the county court would have had no jurisdiction to try even whether the 40*s.* was sufficient or not, for this never could have been ascertained until the plaintiff's right to the pipe and mill had been tried out. Kay L.J. has gone through the cases, and I do not refer to them again.

In my judgment, this appeal must be allowed with costs here and below; and the plaintiff is entitled to have his costs taxed against the defendant.

Appeal allowed.

Solicitors for plaintiff: *G. Trenam, for Sager, Todmorden.*

Solicitors for defendant: *Kirkman, for Eastwoods & Sutcliffes, Todmorden.*

E. L.

1895
July 11.

CAFFIN *v.* ALDRIDGE.

Ship—Charterparty—Cargo—Hiring of entire Capacity of Ship—Port—Deviation.

By charterparty, which commenced with a statement that the ship was of a dead weight capacity of 125 tons, it was agreed between the plaintiff and the defendant, the shipowner, that the ship should load at Rotherhithe from the plaintiff "a cargo or estimated quantity of 470 quarters of wheat," and proceed with it to Gosport and there deliver it. The charterparty contained the usual exception of sea perils. It was also thereby provided that the ship should have "liberty to call at any ports in any order." Four hundred and seventy quarters represent 102 tons. The ship, having loaded the wheat, proceeded to Millwall, where she took on board from another shipper some wire netting for carriage to Portsmouth Dockyard. Rotherhithe and Millwall are both in the port of London, and Gosport and Portsmouth Dockyard are both in the port of Portsmouth. The ship proceeded to Portsmouth Dockyard, where she discharged the netting, and was crossing the harbour to Gosport when by an accident arising from sea perils she sprung a leak, whereby the wheat was damaged. The plaintiff claimed that the ship in not proceeding direct to Gosport had been guilty of a deviation :—

Held, that the liberty "to call at any ports" included liberty to call for the purpose of loading or discharging other cargo there, for that the charterparty, notwithstanding the use of the term "cargo," did not amount to a hiring of the full carrying capacity of the ship; and further, that the term "ports" was not to be understood in a technical sense, but to include any usual and proper loading or discharging places, even though within the same port; that there had consequently been no deviation, and that the plaintiff could not recover.

Action tried before Lord Russell of Killowen C.J. without a jury.

By a charterparty dated June 23, 1894, which was headed with the words, "Dead weight capacity 125 tons," it was agreed between the defendant, the owner of the ship *Alice Little*, and the plaintiff, John Caffin, merchant, that the ship should proceed to Rotherhithe "and there load from the factors of the said affreighter a cargo or estimated quantity of 470 qrs. wheat in sacks $\frac{\text{and}}{\text{or}}$ other lawful merchandise," and being so loaded should "therewith proceed to Gosport (Royal Clarence Yard)," and there deliver the same on being paid freight at 1*s.* per quarter.

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The charter contained the usual exception of sea perils, and a clause giving the ship "liberty to call at any ports." The charter was on a printed form, according to which the ship was to load "a full and complete cargo"; but the words "full and complete" were struck out and the words "or estimated quantity of, &c.," added in writing. Four hundred and seventy quarters of wheat represent 102 tons. The ship, having loaded the wheat at Rotherhithe under the charter, instead of proceeding straight to Gosport, went to Millwall, where she took on board from another shipper ten tons of wire torpedo netting for carriage to Portsmouth Dockyard. Rotherhithe and Millwall are both in the port of London, and Gosport and Portsmouth Dockyard are both in the port of Portsmouth. With this cargo on board the ship proceeded to Portsmouth Dockyard, where she discharged the netting. She then proceeded to cross the harbour to Gosport, when she accidentally fouled a pile, which caused her to spring a leak, whereby the wheat was damaged. The plaintiff then brought this action to recover damages for the injury to the wheat, claiming that the ship, in not proceeding direct from Rotherhithe to Gosport, had deviated from her chartered voyage, and that the damage had occurred in the course of such deviation.

Cohen, Q.C., and *Scrutton*, for the plaintiff. The "liberty to call at any ports" did not include liberty to call for the purpose of loading or discharging cargo, for under the terms of this charterparty the defendant was not entitled to take on board any other shipper's goods. The defendant contracted to load a "cargo" of the plaintiff's wheat, and the use of that term imports a hiring of the full carrying capacity of the ship: *Kreuger* v. *Blanck* (1); *Borrowman* v. *Drayton*. (2) There are, as pointed out by Mellish L.J. in the last case, many reasons why a person should wish to have the entire load of a ship in preference to part of the load. There is an especial reason in the case of wheat, which is a delicate cargo and liable to be damaged by having other cargo loaded along with it. Secondly, if the plaintiff is wrong on that point, still the liberty to call

(1) L. R. 5 Ex. 179. (2) 2 Ex. D. 15.

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was only a liberty to call at other ports—not at other places in the same port, which was the case here.

Sir W. Phillimore (*F. W. Raikes, Q.C.*, and *B. Aspinall* with him), for the defendant. The contract was not a contract for a full and complete cargo. The ship was intended by both parties to be running as a general ship. The capacity of the ship was stated to be 125 tons, and the wheat only represented 102 tons; and it was evidently intended that the defendant should be at liberty to load other goods, for the words "full and complete" before the word "cargo" were struck out. Then, if so, the defendant was acting in accordance with the terms of the contract in sending the ship to Millwall to load the netting and to Portsmouth to discharge it, for "a liberty to call at any ports in any order" means a liberty to call for purposes of business, such as taking in or unloading cargo, at any ports which are substantially on the course of the voyage: *Leduc* v. *Ward*. (1) See, too, *Glynn* v. *Margetson*. (2) As to the other point, that the liberty does not extend to calling at different places in the same port, it is to be observed that certain classes of goods, such as explosives and cattle, are by Government regulations required to be landed at special stations in a port; but it could not be contended that a ship, by going to one of such stations before proceeding to her berth where she is intended to discharge the rest of her cargo, is guilty of a deviation.

Scrutton, in reply. The words "full and complete" were struck out of the printed form in the interest of the charterer, not of the shipowner. The object was to avoid any possible claim for dead freight. As to the delivery of explosives or cattle at special stations in the same port, the reason why the shipowner would be protected from the consequences of so doing would be, not that such stations would be within the liberty to call at any ports, but that the act of going there would come within usual exception of "restraint of princes."

LORD RUSSELL of KILLOWEN C.J. In this case the plaintiff sues the defendant for damage done to a certain quantity of wheat shipped on board the defendant's sailing barge at Rother-

(1) 20 Q. B. D. 475. (2) [1893] A. C. 351.

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hithe under a written contract by which the defendant undertook to proceed with it to the Royal Clarence Yard, Gosport. It appears that the defendant took on board, in addition to the plaintiff's wheat, ten tons of wire torpedo netting belonging to some person, which the defendant contracted to deliver at Portsmouth Dockyard. The barge proceeded with this cargo on board to Portsmouth Dockyard, where she delivered the netting, and was proceeding across from Portsmouth to Gosport when she encountered an accident arising from sea perils. The question is whether the act of so proceeding to Portsmouth for the purpose of delivering the netting was a deviation. If it was a deviation, then, inasmuch as the loss occurred after that deviation had taken place, the authorities are clear that the defendant would be liable. The answer to the question depends upon the true construction of the charterparty. If this charterparty is to be regarded as a hiring of the full carrying capacity of the ship, to the exclusion of any other shipper's goods, that would strongly support the contention advanced by the plaintiff. But is it to be so regarded? It begins with a statement that the dead weight capacity of the barge is 125 tons. Then it says that the barge shall proceed to Rotherhithe, and there load, not a full and complete cargo of wheat, but "a cargo or estimated quantity of 470 quarters wheat." No doubt the printed words proceed "and other lawful merchandize"; but seeing that the only freight named is at per quarter of wheat, in my judgment that clause when read in connection with the statement as to the dead weight capacity, points clearly to the conclusion that what the parties intended was, not that the plaintiff should be entitled to the full capacity of the vessel, but merely that the defendant should carry the estimated quantity of wheat, and should have the right of filling up the vessel with any other lawful merchandize, provided it was not of such a character as to be likely to be injurious to the wheat, or to be otherwise inconsistent with the performance of the defendant's contract with the plaintiff. And, though it was not intended that the wheat should be the only goods on board, I do not think that it was improperly described as a cargo, for it was a cargo in one sense of the term. Mr. Scrutton suggested that the words "full and complete" were struck out of

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the printed form merely in order to protect the charterer from the possibility of a claim for dead freight. But I cannot agree. I think it was because the defendant, knowing that the wheat would not fill the vessel, intended to reserve the right to load other goods on board. And to my mind it was mainly with the object of supplementing and giving effect to that right that the parties agreed to the clause giving the vessel "liberty to call at any ports in any order." The intention was that she should call at other places for the purpose of loading and discharging such other goods as in the exercise of the right reserved the defendant contracted to carry for other shippers. But then it was argued that the defendant could not rely upon that clause, for that what the vessel did was to call, not at any other ports, either for loading or discharging, but at different places in the same ports. But, according to my view, the word "ports" in this contract was not intended to be used in any technical sense, but meant nothing more than any customary and proper places for loading or discharging cargo whether in different ports or in the same port. I hold, therefore, that what the defendant did in this case was in accordance with the terms of the contract, that there was consequently no deviation, and that the plaintiff cannot recover.

Judgment for the defendant.

Solicitors for plaintiff: *J. & H. Farnfield.*
Solicitors for defendant: *Farlow & Jackson.*

J. F. C.

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July 17, 19.

Carrier—Goods—Carriage by Sea—Goods shipped without Bill of Lading—Liability of Shipowner.

The plaintiff, a wool-merchant at Bradford, bought wool in London, and handed a delivery order to the defendant, who shipped the wool on board his steamer in London, carried it by sea to Goole, and forwarded it by rail to Bradford, charging the plaintiff a through rate of 1*l.* 7*s.* 6*d.* per ton, which covered all expenses of the transit from London to Bradford, including insurance. The insurance was effected by the defendant, who selected the underwriters, and paid the premium, after receiving directions from the plaintiff as to the amount per bale for which he was to insure. The plaintiff did not receive possession of the policy, and on previous occasions, when losses had occurred, the defendant had received payment from the underwriters, and had settled with the plaintiff. The wool was shipped without a bill of lading. In cases where the plaintiff imported wool from Australia, he insured it for the whole transit, and the defendant charged only 1*l.* 5*s.* 9*d.* per ton for its conveyance from London to Bradford.

In an action to recover damages for injury by sea-water to the plaintiff's wool bought in London and shipped by the defendant's steamer:—

Held, that the defendant had insured the wool, not as agent for the plaintiff, but to cover his own liability as carrier, that he was exercising a public calling, and had undertaken a liability equal to that of a common carrier, and had not, either expressly or impliedly, stipulated for any limitation of his liability, and therefore was liable without proof of negligence.

Liver Alkali Co. v. *Johnson* (L. R. 9 Ex. 338) followed.

Trial of action in the commercial court before Lord Russell of Killowen C.J.

The plaintiff was a wool-merchant, carrying on business at Bradford in Yorkshire, and the defendant was the owner of steamers employed in the carrying trade, and traded under the title of "Jescott Steamers." The plaintiff claimed to recover damages to the amount of 484*l.* 11*s.* 11*d.* for injury alleged to have been caused by sea-water to certain bales of wool while being carried on board one of the defendant's steamers from London to Goole in Yorkshire. The course of business between the parties was as follows. The plaintiff bought wool at sales in London, and then handed to the defendant forwarding-notes

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directing the brokers from whom the wool had been purchased to deliver to the defendant the bales of wool specified in the notes. The forwarding-note produced in the present case was dated October 3, 1893. At the foot of the note were printed the following words: "Insurance to be effected on above-mentioned —— bales at the rate of £—— per bale." The rate per bale in the note of October 3, 1893, was filled in as 15*l.* The defendant shipped the wool on board his steamer in London, and carried it by sea from London to Goole, where he delivered it to the railway company, to be forwarded to Bradford, and there delivered to the plaintiff. There was no bill of lading. The defendant charged the plaintiff a through rate per ton, which covered all the expenses of the transit from London to Bradford, including insurance. This rate per ton varied from time to time; but the rate charged for all the wool which was the subject of this action was 1*l.* 7*s.* 6*d.* per ton. The defendant insured the wool, through insurance brokers, with such underwriters as he chose, for 15*l.* per bale, the amount specified in the forwarding-note, and paid the premium. The defendant advised the plaintiff that the insurance had been effected; but the plaintiff did not receive possession of the policy. On previous occasions, when losses had occurred, the defendant had received payment from the underwriters, and had afterwards settled with the plaintiff for the loss. The plaintiff sometimes imported wool direct from Australia, and when it arrived in London employed the defendant to forward it to Bradford. In such cases the plaintiff insured the wool for the whole transit from Australia to Bradford; and the defendant charged the plaintiff only 1*l.* 5*s.* 9*d.* per ton instead of 1*l.* 7*s.* 6*d.* for the transit from London to Bradford, thus allowing a reduction of 1*s.* 9*d.* per ton. The wool which the plaintiff from time to time entrusted to the defendant for carriage varied in value so much that some of the wool was worth eight times as much as other wool. In the present case, when the wool was delivered from the defendant's steamer to the railway company at Goole it was found that a number of the bales had been damaged by sea-water. The underwriters refused to pay in respect of such damage, alleging delay in making the claim and in examining the damaged wool. A correspondence ensued, in which the

plaintiff contended that the defendant was bound to pay him in respect of the damage to the wool, and claim against the underwriters, while the defendant suggested that the plaintiff was the right party to enforce the claim against the underwriters, and ultimately the present action was brought. There was an alternative claim put forward in the statement of claim, on the ground that the damage was caused by the negligence of the defendant's servants; but this claim was not supported by the evidence.

The facts as above stated were proved at the trial by witnesses and by documents and admissions.

July 17. *Channell, Q.C.*, and *English Harrison*, for the plaintiff. The defendant, having shipped the goods without protecting himself by a bill of lading, has undertaken the liability of a common carrier, and no stipulation excluding his liability can fairly be implied from the course of dealing between the parties. The contract is primâ facie a contract to carry safely, and it lies on the defendant to prove the assent of the parties to some exception; he fails to satisfy this burden of proof. The course of dealing shews that the insurance was effected by the defendant, not as agent for the plaintiff, but on his own account, to cover the risk to which he was liable as carrier. The stipulation on the part of the plaintiff that the defendant shall insure at 15*l.* per bale is a natural and reasonable stipulation, for it is natural that the owner of the goods should desire some further protection than the liability of the shipowner; and if the shipowner is protected by insurance there is no risk of his being unable to satisfy the claim of the owner of the goods. The defendant pays the premium, and the plaintiff has nothing to do with the insurance. It is a fallacy to suggest that the deduction of 1*s.* 9*d.* per ton, allowed in the case of wool imported from Australia, represents the insurance premium, because the amount of the insurance, and therefore also of the premium, varies in different instances, according to the value of the wool, while the freight remains the same. The 1*s.* 9*d.* is allowed in the case of Australian wool because it is already insured. It follows that the defendant is liable for the damage, and it is unnecessary for the plaintiff to prove negligence.

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Joseph Walton, Q.C., and *Hollams*, for the defendant. A shipowner is not a common carrier: *Liver Alkali Co.* v. *Johnson* (1); *Nugent* v. *Smith*. (2) The terms of the contract between the parties are to be inferred from the course of business, and the proper inference is that it was the intention of both parties that the underwriters should bear the risk. In the case of wool imported from Australia 1*s.* 9*d.* per ton is deducted from the amount charged for freight, in consideration of the defendant's exemption from payment of the premium in that case. In the case of wool bought in London the defendant, for the sake of convenience, effects the insurance, as agent on behalf of the plaintiff, and charges the plaintiff with the amount of the premium as part of the inclusive charge of 1*l.* 7*s.* 6*d.* per ton. [He also referred to *Tate* v. *Hyslop*. (3)]

Channell, Q.C., in reply. *Liver Alkali Co.* v. *Johnson* (4) is in the plaintiff's favour, for it shews that, though the defendant is not strictly speaking a common carrier, he undertakes as great a liability.

Cur. adv. vult.

July 19. LORD RUSSELL of KILLOWEN C.J. The plaintiff in this case is a wool-merchant, carrying on business at Bradford, and the defendant is a shipowner, trading as "Jescott Steamers," and owning vessels carrying goods between London and Goole. The plaintiff alleges that the defendant entered into a contract to carry wool for the plaintiff from London to Goole by sea in the defendant's steamer, and to forward the wool by railway from Goole to Bradford, to be delivered there to the plaintiff, and that the defendant failed to carry the wool safely, in consequence of which it was damaged by sea-water, and the plaintiff now seeks to recover damages from the defendant in respect of such injury to the wool. I have only to consider the question of liability, for it has been arranged that any question of amount which may arise shall be dealt with elsewhere. No formal defence has been put in; but the nature of the defence relied on has been very clearly stated. It is in effect a denial

(1) L. R. 7 Ex. 267; affirmed L. R. 9 Ex. 338.

(2) 1 C. P. D. 19; reversed 1 C. P. D. 423.

(3) 15 Q. B. D. 368.

(4) L. R. 9 Ex. 338.

that the defendant undertook to carry the wool safely, for he alleges special terms, and contends that it was agreed that he should, as agent for the plaintiff, take out policies of insurance on the wool, and should not be liable, except for loss or damage occasioned by causes not covered by the policies. The question to be determined is, whether the defendant, who undoubtedly exercises the trade of a carrier of goods, has entered into a contractual relation with the plaintiff, so as to exclude his liability for the loss which has occurred. The law on the subject is laid down in the case of the *Liver Alkali Co.* v. *Johnson* (1), decided in the Exchequer Chamber in the year 1874. In that case the action was brought against the defendant for not safely and securely carrying certain goods. The defendant was a bargeowner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini; but the customer fixed in each particular case the points of arrival and departure. Under these circumstances the Court of Exchequer Chamber held that the defendant in exercising this employment had incurred the liability of a common carrier, and was liable though the goods were lost without negligence on his part. That case therefore was not a case of conveyance by general ships, but of conveyance under special agreements. Blackburn J., in the course of his judgment, after referring to the history of the law relating to the liability of carriers, said: "It is too late now to speculate on the propriety of this rule, we must treat it as firmly established that, in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability." (2) Brett J. makes the distinction that, although in that case the defendant was not a common carrier, nevertheless he had undertaken all the liability of a common carrier. He says: "He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common

(1) L. R. 9 Ex. 338.

(2) L. R. 9 Ex. at p. 340.

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carrier. The defendant in the present case, in my opinion, carried on his business like any other owner of sloops or vessels, and was not a common carrier, and was in no way liable as such. But I think that, by a recognised custom of England—a custom adopted and recognised by the Courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and recognised by them—every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions." (1) I prefer of the two the language of Blackburn J., although there is really no essential difference.

The question which I have to determine in the present case is this. Was there in the contract any stipulation, express or properly implied, the effect of which was to limit the defendant's liability? He was exercising a public employment, and he undertook to carry goods for customers, by his steamers, in the course of that employment, and the question therefore is whether there was any stipulation, express or implied, that the contract should be subject to limitations. In the present case there is no written statement of all the terms of the contract, there are no circulars and no notices, but the defendant contends that a limitation is to be implied from the course of dealing between the parties. In order to ascertain whether this contention is or is not well founded, it is necessary to examine the course of business, and to consider the terms of the document of October 3, which is the only one document which I consider of any importance in the case. The course of business may be stated thus. The plaintiff has had relations with the defendant for a considerable time. The plaintiff's business, so far as the present case is concerned, consisted of dealings in two classes of goods: first, wool which he bought in London, and caused to be shipped from London to Goole, and forwarded by rail from Goole to Bradford; and, secondly, wool which he imported from Australia

(1) L. R. 9 Ex. at pp. 343, 344.

to London, and caused to be forwarded thence to Bradford. In the case of the London goods, the plaintiff bought them at the sale in London, and then gave the delivery order to the defendant; and the defendant undertook to get the goods from the warehouse, and to carry them to the wharf and ship them, and carry them by sea to Goole, and there deliver them to the railway company, to be carried by rail to Bradford, and there delivered to the plaintiff. The payment of freight was calculated at a fixed sum per ton, which covered all expenses incurred in the transit. The rate of freight was from time to time subject to variation; but, so far as the present case is concerned, the rate in every instance was 1*l.* 7*s.* 6*d.* per ton. With regard to these London goods, according to the course of business the defendant effected the insurance on such terms, and with such underwriters, as he chose, in pursuance of (or after) a direction by the plaintiff, and, in the case of the London goods, where a loss happened, after examination by an appraiser, the plaintiff claimed from the defendant, and the defendant claimed from the underwriters; and, after receiving payment from the underwriters, the defendant settled with the plaintiff. With the actual insurance of these goods the plaintiff had nothing to do. He never communicated with, or selected, the underwriters, and he never had possession of the policies. He had no relations of any kind with the underwriters. In the case of the Australian wool, the course of business was for the plaintiff to effect policies on the goods from the time of their shipment in Australia, to cover all loss or damage that might occur anywhere in the course of the transit from Australia to Bradford. In such a case a difference was made as to the freight from London to Bradford. In the case of the London wool, the whole risk was covered by the policies effected by the defendant, and the freight was 1*l.* 7*s.* 6*d.* per ton. In the case of the Australian wool, the defendant charged the plaintiff a less sum by 1*s.* 9*d.* per ton for the freight from London to Bradford. A document was put in dated October 3, on a printed form, which directs the brokers from whom the plaintiff has purchased the wool to deliver to the defendant the bales of wool specified in that document. At the foot, also printed, occur the words: "Insurance to be effected on

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above-mentioned —— bales at the rate of £—— per bale," and the number of the bales and rate of insurance per bale (in this case 15*l.*) is filled in. Considerable discussion took place as to the effect and meaning of this document. It was common ground that it was in effect evidence of a mandate (certainly of a wish) on the part of the plaintiff that the bales of wool should be insured by the defendant, and of an acceptance by the defendant, amounting to a contract that he would insure them for 15*l.* per bale. The main contest was this. Was the right inference to be drawn the inference that the insurance was effected by the defendant as agent for the plaintiff, or was the document a mere request that the wool should be insured by the defendant? It was further in controversy what was the true meaning of the whole stipulation when expanded. The defendant says the effect is that the plaintiff stipulates that the defendant shall insure the wool at 15*l.* per bale, and agrees not to look to the defendant for any loss or damage, so far as such loss or damage is covered by the insurance. The plaintiff says it simply means this: "I, the owner of the goods, require you, the shipowner, to insure. You, as carrier, have an insurable interest, and I require you to insure, in order to secure for me a greater certainty of payment in the event of a loss." The first question is, was it an insurance by the defendant as agent for the plaintiff, or was it effected by the defendant, as a carrier who was not protected by a bill of lading, in order to protect himself from the liability to which he would be subject in the event of a loss? The question is by no means free from doubt; but on the whole I come to the conclusion that the insurance was effected by the defendant for his own protection, and not as agent on behalf of the plaintiff. In the first place, it is not usual for a merchant to ask the shipowner to insure on his behalf. If he wished to insure he would probably effect the insurance himself. In the next place, the whole transaction was carried out by the defendant. The plaintiff had nothing to do with effecting the insurance, but he made his claim against the defendant, leaving the defendant to claim against the underwriters. Moreover, there is no relation between the freight and the premium paid for insurance. This is apparent, for we were told by the plaintiff that the wool varied in value so

much that some of the wool was worth eight times as much as other wool; but the freight was always the same—1*l.* 7*s.* 6*d.* a ton.

Lastly, I see nothing remarkable in the shipowner insuring himself. In a case where there was a bill of lading with widely sweeping exceptions, no doubt it would be unnecessary; but where, as here, there is no bill of lading, the shipowner frequently effects an insurance in order to protect himself against liability.

For these reasons on the whole I come to the conclusion that the insurance was not effected by the defendant as agent for the plaintiff.

But even if I am wrong in this conclusion, and the insurance was effected by the defendant as agent, that is not conclusive against the defendant's liability. In the ordinary case, where the carrier protects himself by a bill of lading, the merchant's only remedy would generally be against the underwriters; but where there is no bill of lading, the fact of the merchant insuring is not conclusive that he was to look only to the insurer in the event of a loss.

I fail to find any stipulation, express or implied, shewing that the defendant imported any exception into the contract. It is contended that the case of the foreign goods affords a strong ground for such an inference. I do not think so. In the case of goods sent from Australia the defendant made an allowance of 1*s.* 9*d.* per ton; the reason is obvious—the goods were already insured, and there was no need for a double insurance.

It is not necessary to decide the point which I am about to mention, but I wish to say that I adhere to the view which I suggested in the course of the argument, that I see no difficulty in coming to the conclusion that, in the case of the Australian wool, the stipulation on the part of the plaintiff amounted to this: "In consideration of your allowing me 1*s.* 9*d.* a ton reduction, I will admit you to the benefit of the insurance which I have already effected." I take a strong view that, as a matter of good sense, this is the natural explanation.

For the reasons which I have given, I come to the conclusion that the defendant, who was exercising a public calling, and has undertaken all the liability of a common carrier, is liable in this

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action. I cannot draw the inference that he has, either expressly or impliedly, stipulated for any such limitation as has been suggested.

I have thought it right to deal with this case in some detail, as the point is one of considerable difficulty; but the case is not of very great interest, because there is the policy of insurance, and, though I do not wish to prejudge the case, as at present advised I can see no defence on the part of the underwriters to a claim on the policy. This litigation was brought about by the fact that, owing to some omission on the part of a clerk, the claim on the policy was allowed to slumber, and in consequence the underwriters looked upon it with suspicion, and declined to pay.

I am of opinion that the plaintiff is entitled to judgment, with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Flower, Nussey & Fellowes, for Killick, Hutton & Vint, Bradford.*

Solicitors for defendant: *Hollams, Son, Coward & Hawksley.*

P. B. H.

C. A.

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June 28.

[IN THE COURT OF APPEAL.]

RODDICK *v.* INDEMNITY MUTUAL MARINE INSURANCE COMPANY, LIMITED.

Insurance (Marine)—Subject-matter—"Hull and Machinery"—"Disbursements"—Warranty—Breach—"Warranted uninsured"—"Honour" policies.

The plaintiff effected a time policy with the defendants for 1000*l.* on the "hull and machinery" of a steamship, which were valued at 10,000*l.* The policy contained a proviso "5000*l.* warranted uninsured." The policies effected by the plaintiff on the hull and machinery were for sums amounting in the whole to 5000*l.* He had, however, by means of "honour" policies, effected further insurances to the extent of 2600*l.* upon "disbursements." The ship was lost within the insured period, and the defendants disputed their liability on the ground that the "honour" policies constituted a breach of the warranty:—

Held, affirming the decision of Kennedy J. ([1895] 1 Q. B. 836), that the "honour" policies did not cover any part of the subject-matter of the

policy on "hull and machinery," and were, therefore, not a breach of the warranty.

But *quære* whether Kennedy J. was right in holding that, if the "honour" policies had covered any part of the subject-matter of the other policy, they would have been a breach of the warranty.

APPEAL by the defendant company against the judgment of Kennedy J. at the trial of the action. (1)

The action was brought upon a policy of marine insurance for 1000*l.*, dated January 8, 1894, effected by the plaintiff with the defendant company. The policy was declared to be upon the "hull and machinery" of the steamship *Oxenholme*, which were valued at 10,000*l.* The policy contained the following warranty —"5000*l.* warranted uninsured, except for running down clause"; and also—"Warranted trading between River Plate (not above but including Buenos Ayres) and Rio de Janeiro, Bahia, Santos and/or Pernambuco, and including risk out and home from the Mersey, with leave to call as required especially any ports and/or places in the Bristol Channel." The policy was for six months from January 9, 1894, to July 8, 1894. The ship was lost on June 4, 1894; but the defendants disputed their liability on the policy on the ground that there had been a breach of the first warranty.

The plaintiff effected policies (including the policy for 1000*l.* with the defendants) expressly upon the hull and machinery of the ship to the extent of 5000*l.* and no more. He also effected some other insurances, to the total amount of 2600*l.*, upon "disbursements." All the "disbursement" policies were what are known as "P. P. I." or "honour" policies—that is, policies in which it was stipulated that the policy should be deemed sufficient proof of interest—and therefore null and void in law under the Act 19 Geo. 2, c. 37. The defendants asserted that these policies were a breach of the warranty that 5000*l.* was uninsured.

The plaintiff in his answer to the defendants' interrogatories stated that he intended in effecting the "honour" policies for 2600*l.* to cover certain disbursements, amounting to 2583*l.*, for coals, stores, and expenses, which he had made in respect of the

(1) [1895] 1 Q. B. 836.

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ship in view of her proceeding from the United Kingdom to the coast of South America and afterwards trading there, as warranted by him in the defendants' policy. The figures of the disbursements were as follows:—

About 1487*l.* expended on coal.
„ 318*l.* engine-room and deck stores.
„ 462*l.* provisions and cabin stores.
„ 191*l.* port expenses at Newport and advances.
„ 395*l.* premiums.

From the cross-examination of the plaintiff and the master of the ship it appeared that within the six months the whole of the coals would probably have been used, and a large portion at least of the stores; and that, although some of the provisions might remain, this would be because fresh provisions would in ordinary course be taken on board from time to time at the ports at which the vessel would call in the course of trading along the coast. In fact, before the ship was lost 750 tons of the coals had been sold to make room for cargo at a South American port. The master also deposed that on the voyage outward from the United Kingdom to South America, lasting about twenty-seven days, the steamer would use about twenty-five tons of coal every day, and also a portion of her stores and provisions.

The plaintiff called two witnesses, an underwriter and an insurance broker, and their evidence in the opinion of the learned judge came to this: that an insurance on "hull," according to the well-known practice of underwriters, would in a "voyage policy" include such equipment or outfit (in the case of a steamship), in the shape of bunker coal and ordinary deck and engine-room stores, as would be necessary for the voyage described in the policy. The learned judge held first, that this evidence was not inferentially applicable to the case of a "time policy"; that the "honour" policies on "disbursements" could not be disregarded in reference to the warranty of "5000*l.* uninsured" on account of their legal invalidity; and that, if the disbursements were covered by the defendants' policy, there had been a breach of the warranty; secondly, that the "disbursements" were not covered by the policy on "hull and machinery,"

and that consequently there had been no breach of the warranty, and the plaintiff was entitled to recover. The defendants appealed.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. In the case of a steamship an insurance upon the "hull and machinery" is equivalent to an insurance upon the "ship" in the case of a sailing vessel, and must be taken to include all which would be covered by the word "ship" in the latter case. The word "ship" covers everything which is necessary for the use of the ship as a ship, e.g., stores and bunker coal: *Oppenheim* v. *Fry* (1); *Brough* v. *Whitmore*. (2)

[LORD ESHER M.R. referred to *Robertson* v. *Ewer*. (3)]

It can make no difference whether the policy be a time policy or a voyage policy.

As to the other point, the learned judge was right in holding that, the warranty being in effect that the plaintiff should be his own insurer to the extent of 5000*l*., it was immaterial whether the breach was caused by a legal policy or by an "honour" policy. It was practically certain that the "honour" policies would be paid in the event of a loss.

Pickford, Q.C., and *T. G. Horridge*, for the plaintiff, were not called upon.

LORD ESHER M.R. Different forms of policy have been adopted by different insurance companies. Originally a ship was not insured by the word "ship" alone; but some insurance companies have adopted that form of policy, and the Courts have had to determine what is the meaning of the word "ship" in a policy insuring against perils of the sea. To hold that the word included only the hull of the ship would have been absurd; and the Courts have accordingly held that the word included something more than the hull—how much more it is not necessary to say now. There is, as it seems to me, clear authority for holding that the word "ship" does not include the provisions which are taken on board; but it is not necessary to decide that

(1) 3 B. & S. 873.

(2) 4 T. R. 206.

(3) 1 T. R. 127.

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now. The defendant company have departed from the use of the word "ship," and have used instead of it another term—"hull and machinery"—and we have to construe those words. The "hull" of a ship is a well-known nautical term. If you were to tell a sailor that the "hull" of his ship included the provisions on board he would be very much surprised; and so he would if he were told that the provisions were part of the "machinery" of the ship. Taking the words "hull and machinery" in their ordinary natural sense, it is perfectly clear what they mean. Has it then been proved that these words have, as between assurer and assured, universally acquired a meaning different from their natural meaning? In my opinion, the learned judge was quite right in holding that this had not been proved. I am satisfied that the words "hull and machinery" cannot be taken as including those things which are covered by the "disbursement" policies. It follows that the defence of breach of warranty cannot be maintained, and the learned judge was right in so holding. This being my view of the evidence, it becomes unnecessary to deal with the other point which has been decided by Kennedy J., namely, that an "honour" policy, which is null and void in law, can nevertheless be taken into account as a breach of a warranty that a ship is uninsured to a specified amount. But it must not be assumed that I assent to the view of the learned judge on this point.

KAY L.J. The defence to this action is that there has been a breach of a warranty contained in the policy upon which the plaintiff sues, and that, therefore, he cannot recover. The warranty was that to the extent of 5000*l.* the plaintiff was uninsured, and it is said that he had in fact effected other policies for a part of the 5000*l.*; that though those policies were "honour" policies, and of no legal force, yet they were certain to be paid in the event of a loss; and therefore the warranty that the shipowner should retain a liability of 5000*l.* was broken. But it is plain that those policies did not constitute any legal security.

The real question, however, arises upon the true construction of the policy effected with the defendants. That which is

insured by it is the "hull and machinery" of the steamer, whatever those words may mean. The question is whether the coals, stores, and expenses which were covered by the "honour" policies are also included in the policy upon "hull and machinery." The argument is that, if that policy had been upon a "ship," some of the things which are covered by the "honour" policies would have been included under the word "ship." In Arnould on Marine Insurance, 5th ed. p. 22, it is said that the term "ship" in a policy in which the vessel insured is stated to be a steamer would suffice to cover both hull and machinery. I observe that in Maclachlan on Merchant Shipping, 3rd ed. p. 17, it is stated that, although Lord Mansfield says that the boats, rigging, and stores of a ship are covered by a policy on the ship, with her tackle, apparel, furniture, &c., "it is the common practice in marine insurance expressly to name the boats." But, even if so large a construction as to include these stores could be given to the word "ship," the parties to this policy have not chosen to use that word; they have used the words "hull and machinery." It is urged that in the case of a steam vessel those words have the same meaning as the word "ship" would have in the case of a sailing vessel. We may put aside the word "machinery," and the question will be, whether the things covered by the "honour" policies are included under the term "hull." No one would naturally give that construction to the word, and no authority has been cited for so doing. In my opinion, the word "hull" does not include any of those things which are covered by the "honour" policies. It has been attempted to prove that among underwriters a special meaning has been acquired by the word "hull"—a meaning large enough to include the items which are covered by the "honour" policies. But what did this evidence come to? That in a "voyage policy" the word "hull" would include such stores as would be necessary for the performance of the voyage described in the policy. But the policy upon which this action is brought is not a "voyage policy"; it is a "time policy"; and one can easily see a reason for a difference in this respect between a "voyage policy" and a "time policy." If the appellants rely upon this evidence, they must take it as it was given. The evidence was confined to a

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"voyage policy," and no evidence was given of a custom to use the term "hull" in such a special sense in a time policy.

A. L. SMITH L.J. If the plaintiff has committed a breach of a warranty contained in the policy sued on he obviously cannot maintain the action. The subject-matter of the policy was the "hull and machinery" of a steamship, and it was an ordinary "time policy," the warranty being that the plaintiff stood uninsured for 5000*l.* upon the "hull and machinery," valued at 10,000*l.* It is said that the warranty was broken because the plaintiff effected other policies upon disbursements to the amount of 2600*l.* which covered part of what was included in the first policy, and that he therefore did not stand his own insurer for 5000*l.* upon hull and machinery. The plaintiff's answer is twofold: (1.) That he did in fact stand his own insurer for 5000*l.* on "hull and machinery," for the other policies, which were upon disbursements, did not cover "hull and machinery"; (2.) that the other policies were "honour" policies, and that the plaintiff had no legal right to recover upon them. There is no evidence that the words "hull and machinery" were used in the time policy in any other than their ordinary sense. What is the ordinary meaning of an insurance upon the "hull and machinery" of a steamship? Does it cover the coal on board, or the provisions and stores? I think it clear that it does not. It was ingeniously argued that "hull and machinery" in the case of a steam vessel means the ship, and that there is authority for saying that the word "ship" covers "coal and stores." In *Brough* v. *Whitmore* (1) the insurance was upon the "ship" and the "furniture" of the ship, and it was held that the policy covered provisions for the use of the crew. That is intelligible, but I am by no means convinced that the word "ship" alone would cover coals, provisions, and stores. Here, however, the words used are "hull and machinery," not "ship," and in my opinion the judgment of the learned judge was right.

With regard to the effect of "honour" policies as being breach of the warranty, the business meaning of the warranty was to secure that the shipowner would be careful in the management

(1) 4 T. R. 206.

of his ship by his remaining uninsured to the extent of 5000*l*. It is not necessary to decide the point; but I am not satisfied that by reason of his having a policy upon which he could not recover at law the shipowner would cease to be his own insurer.

Appeal dismissed.

Solicitors: *Waltons, Johnson, Bubb & Whatton; Pritchard, Englefield & Co., for Simpson, North, Harley & Birkett, Liverpool.*

W. L. C.

[IN THE COURT OF APPEAL.]

MEUX *v.* GREAT EASTERN RAILWAY COMPANY.

Railway Company—Passenger's Luggage—Personal Luggage of Servant—Property of Employer—Injury by Misfeasance of Defendants—Right of Owner to sue.

A servant of the plaintiff took a ticket for a journey on the defendants' railway, and a portmanteau of his was accepted by the defendants as his personal luggage. The portmanteau contained his livery, which was the property of the plaintiff. Through an act of misfeasance of a porter in the employment of the defendants the livery was destroyed. In an action to recover the value of the goods destroyed:—

Held, that the defendants were liable to the plaintiff for the tortious act of their servant in injuring the plaintiff's property.

APPEAL from the judgment of Mathew J. at the trial without a jury.

The action was brought to recover the value of a servant's livery under the following circumstances. The plaintiff directed her servant to travel by the defendants' line from a station in the country to London. He went to the station with a portmanteau, in which was his livery, which belonged to the plaintiff. At the station he took his ticket, which he paid for with money supplied to him by the plaintiff. The portmanteau (as appeared by admissions made in the case) was handed into the custody of the defendants' servants, to be carried by them to town as passenger's luggage, and it was overturned in front of a train by one

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of the defendants' servants, and was damaged and became useless to the plaintiff.

The learned judge decided that the plaintiff could not recover in contract as the contract made by the defendants was a personal contract with the servant, and that she could not recover in tort because the goods were not lawfully on the premises of the defendants. Judgment was accordingly given for the defendants.

The plaintiff appealed.

J. Alderson Foote, for the plaintiff. The plaintiff is entitled to maintain the action, first, on the ground of tort; and, secondly, on the ground of contract. If the railway company by misfeasance damage goods which are lawfully on their premises, they are liable to the owner of the goods as for a tort. According to *Claridge* v. *South Staffordshire Tramway Co.* (1), where goods have been bailed, the bailee cannot recover for injury to them unless he is liable over to the bailor, and therefore the latter must be entitled to sue. The learned judge seems to have thought that the goods were delivered to the defendants, not as being the personal luggage, but as the property of the servant, and so were not lawfully on the defendants' premises. This is a misconception, for they were delivered as the personal luggage of the servant, and no representation was made as to whose property they were—a fact that was immaterial. If *Claridge* v. *South Staffordshire Tramway Co.* (1) was wrongly decided, and the bailee can sue as trustee for the bailor, it is contended that since the Judicature Acts the plaintiff, as the person really interested, can also sue. It is not a question of knowledge on the part of the defendants, for goods, or, as in *Austin* v. *Great Western Ry. Co.* (2), a child, may be lawfully on the company's premises without their knowledge, so as to make them liable, if there is no fraud or intention to deceive. In *Becher* v. *Great Eastern Ry. Co.* (3), which was relied on by the defendants, the portmanteau carried by the servant was not his personal luggage.

The duty owed by the company to the plaintiff is that indicated by Bramwell B. in *Hayn* v. *Culliford* (4), which had been

(1) [1892] 1 Q. B. 422.
(2) L. R. 2 Q. B. 442.
(3) L. R. 5 Q. B. 241.
(4) 4 C. P. D. 182.

recognised in *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (1) and *Martin* v. *Great Indian Peninsular Ry. Co.* (2)

As to the question of contract, it may be contended that the servant taking his ticket with the money of his mistress acted as her agent, and that she can sue on the contract made by him.

Jelf, Q.C., and *Coller*, for the defendants. There was no contract with the plaintiff, and she cannot sue for breach of that made with her servant. The only obligation of the company in respect of this luggage arose out of the contract made with the servant. In effect it was, so far as related to the luggage, a contract of insurance of his property carried as personal luggage, and the company are under no obligation to any one but him for any tortious act of their servants which damages the property of which they have charge. In fact, there has been only a non-feasance in not taking sufficient care of the portmanteau; and if the plaintiff can recover at all it must be in respect of some active negligence amounting to a misfeasance. *Becher* v. *Great Eastern Ry. Co.* (3) and *Alton* v. *Midland Ry. Co.* (4) are entirely in the defendants' favour. [They cited also *Great Northern Ry. Co.* v. *Shepherd* (5) and *Great Western Ry. Co.* v. *Bunch.* (6)]

LORD ESHER M.R. In this case the plaintiff has brought an action against the defendants on the ground that property belonging to her had been injured by the negligence of their servant. The property was in a portmanteau, which was taken by one of the defendants' servants for the purpose of its being placed in a train, and it was said that owing to his carelessness it was allowed to fall on the line so that it was run over by a train and the goods in it were destroyed. It is suggested that there was no evidence that the man was carrying the portmanteau carelessly; but it is not usual for porters to let things fall on the line, and unless there were some explanation of how it had happened any one would say that there was negligence, and we ought so to find. That being so, the plaintiff says there was a

(1) 11 C. B. 655.
(2) L. R. 3 Ex. 9.
(3) L. R. 5 Q. B. 241.
(4) 19 C. B. (N.S.) 213; 34 L. J. (C.P.) 292.
(5) 21 L. J. (Ex.) 114.
(6) 13 App. Cas. 31.

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wrongful act of the defendants with regard to her property, and that she has a right to recover damages. The answer given is that the portmanteau was brought to the station by a servant of the plaintiff, who took a ticket and gave the portmanteau to be carried by the porter as personal luggage under the contract made personally by the plaintiff's servant with the defendants. It is said, therefore, that as the plaintiff was no party to the contract there could be no breach of contract so far as she is concerned. That is quite true where the goods are the personal luggage of the servant and are accepted as such, though it would not apply where a servant is sent with luggage to be forwarded which is paid for and not taken as his personal luggage. In such a case the servant would be making a contract on behalf of his master, who could adopt what was done and sue for breach of contract.

There being no contract in this case with the plaintiff, she gets no right to sue for a breach of the contract which was made, and there is no duty towards her arising on contract. There is nothing in such a state of things that deprives the plaintiff of a right which she has independently of contract, and which she would have even if there were no contract. If goods were put on the premises of the defendants or in a van without any knowledge on their part, they would not be bound to take notice that the goods were there. If they are put openly on the platform, to be carried by the company, they know that the goods are there; they allow them to be there; and it must be a wrongful act for them to deal negligently with them. If they authorize their servants to take luggage up and carry it, the servants must do so with reasonable care, and for any active wrongful act on their part the company are liable. They cannot say that it was done without their authority; and, therefore, for such a wrongful act the person injured has a right of action against them, although as between him and them there was no contract, and although there was a contract between them and some one else with regard to the luggage. It seems to me that the authorities bind us on this point; but even if they did not, I entirely agree with the view expressed by Bramwell B. in *Hayn* v. *Culliford*. (1) There

(1) 4 C. P. D. 182.

goods were lawfully with the defendants' licence on their ship, and they so tortiously dealt with the goods that they were injured. The learned judge first dealt with the case of a contract, and then said: "So also if there is not"—that is, if there is not a contract. "For if so, the case is this: The goods were lawfully with the defendants' licence in their ship, and they tortiously so dealt with them that the goods were injured." The proposition would have been equally good if the word "lawfully" had been omitted, and that word is only inserted to contrast with what follows. He points out that the negligent act of the defendants was wrongful, "not as a breach of contract, but as a wrongful act in itself." He was dealing, not with an omission to do something, or with mere non-feasance, but with misfeasance, and he pronounces such a misfeasance to be an act wrongful in itself. The same principle is to be found in the judgment of the same learned judge in *Foulkes* v. *Metropolitan District Ry. Co.* (1), in which he says there may be no duty by contract, and consequently no cause of action for a non-feasance, but that there was a duty imposed by the law to do no act to injure another. These are authorities which seem to me to be sufficient for the determination of this case, and I think that principle goes with authority.

I cannot think that the case of *Alton* v. *Midland Ry. Co.* (2) touches the present one. It was decided on demurrer on an averment that the action was founded on contract; and that was the basis of the decision, which was that such right founded on contract was not made out.

In this case the evidence is clear that the property belonged to the plaintiff; and, for the reasons I have given, I think she was entitled to succeed. The appeal must, therefore, be allowed.

KAY L.J. In this case the plaintiff's servant was about to travel on the defendants' line, and he took to the station a portmanteau apparently belonging to himself, and containing livery which was the property of the plaintiff. The livery was damaged, and in respect of such damage this action is brought. It was

(1) 5 C. P. D. 157. (2) 19 C. B. (N.S.) 213; 34 L. J. (C.P.) 292.

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damaged by an act described in the admissions in the following terms: "The property was overturned in front of the train by one of the defendants' servants, and the same was destroyed and became useless to the plaintiff." It is quite plain that there was an act, not of omission but of commission, which was negligent and improper, and which caused the destruction of these things.

The law as to such a state of things has been summed up in *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) That was an action for personal injuries to the plaintiff, and the general doctrine is stated thus by Lindley L.J. (2): "It appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon the following reasons. That which caused the injury was not an act of omission, it was not a mere non-feasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All that the plaintiff would have to prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case." A. L. Smith L.J. expressed himself to the same effect (3) that "It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not." To apply that case to the present one—Were these goods lawfully on the premises of the defendants? They were in the portmanteau of the servant, and they were his livery which he was accustomed to wear. He was about to travel as a passenger, and the portmanteau was accepted as his personal luggage, which the company were engaged to carry for him, receiving no payment except for the ticket which he took for himself. It seems to me impossible under these circumstances to say that the livery was not lawfully on the company's premises. I think the test is this. Supposing the

(1) [1895] 1 Q. B. 134. (2) [1895] 1 Q. B. 134, at p. 138.
(3) [1895] 1 Q. B. 134, at p. 140.

company had known that the portmanteau contained the servant's livery, could they have said they would not carry it as personal luggage? It seems to me quite plain that they could not have said anything of the kind, and in that respect the case differs from that of luggage containing goods belonging to other people in which the person who is carrying them as his personal luggage has no kind of interest. The learned judge came to the conclusion that the goods were not lawfully on the company's premises: but on this matter, on which his decision as to this part of the case seems to have been founded, I cannot agree with his view. I am not going to give any opinion upon the question whether, if the goods had not belonged to the servant at all but to some one else, and were in his portmanteau, they would have been lawfully upon the premises of the company. It seems to me, I must confess, a strong proposition to say that, where the company make no inquiry as to what is in the portmanteau, but accept it as personal luggage, they should be able to turn round and say, "The goods were not yours." However, on that point I give no opinion at the present time, because there seems to be some authority in a sense opposite to the view which I have indicated. In this case it seems to me quite impossible to say that the goods were not properly treated by the servant as being his personal luggage and were not lawfully on the defendants' premises. If they were lawfully there and were injured by an act of misfeasance, the authorities seem quite clear that the owner of the goods has a right to sue for damages for the injury caused by the tortious act of the servants of the company.

A. L. SMITH L.J. I also am of opinion that this judgment cannot be supported.

The facts lie in the smallest compass. The plaintiff's footman was sent to London by his mistress, who gave him the money for his fare. He took in a portmanteau his livery, which was the property of the plaintiff. It was received as passenger's luggage, which in fact it was. It did not render it any the less the luggage of the footman because the property in the clothes still remained in the plaintiff. The livery was damaged by the

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active negligence of the company's servant, and the plaintiff seeks to recover in respect of this damage.

I am not going to decide as to what cause of action the footman might have, and what damages he could recover. The case of *Claridge* v. *South Staffordshire Tramway Co.* (1), which bears on this point, may possibly require at some future time further consideration. Of this I am clear, that in the circumstances of this case the footman who had taken the ticket could have sued the company either on contract or in tort, but what damages he could have recovered it is not necessary to discuss. The question before us is whether the plaintiff can sue. She has incurred loss by reason of her property having been destroyed by the active negligence of the servants of the company while it was lawfully on the premises of the company; she has therefore a right of action in tort wholly irrespective of contract. Her goods were lawfully on the defendants' premises, and by their active negligence those goods have been damaged. That gives her a good cause of action in tort. The only answer given is that *Alton* v. *Midland Ry. Co.* (2) has decided otherwise; but this is not so. I pointed out in *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3) that when the former case is looked into it appears that the sole point which was decided was on demurrer, which raised the question whether, the servant having contracted with the railway company to be safely and securely conveyed, the master could take advantage of that contract and sue for breach of it. That case is no authority for the proposition that the plaintiff cannot sue in tort irrespective of contract. There is plenty of authority on the other side: *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (4), *Hayn* v. *Culliford* (5), *Foulkes* v. *Metropolitan District Ry. Co.* (6), *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3), and *Kelly* v. *Metropolitan Ry. Co.* (7), the bulk of the cases being in this Court. It seems to me, therefore, that it is impossible to say on the facts of this case that the plaintiff has not a good cause of action against the

(1) [1892] 1 Q. B. 422.
(2) 19 C. B. (N.S.) 213; 34 L. J. (C.P.) 292.
(3) [1895] 1 Q. B. 134.
(4) 11 C. B. 655.
(5) 4 C. P. D. 182.
(6) 5 C. P. D. 157.
(7) [1895] 1 Q. B. 944.

company in tort. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Upton & Britton.*
Solicitor for defendants: *E. Moore.*

A. M.

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[IN THE COURT OF APPEAL.]

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SARSON *v.* ROBERTS.

Landlord and Tenant—Lease of Furnished House—Implied Condition of fitness for Habitation—Continuance of Condition during Term.

On the letting of furnished lodgings there is no implied agreement that the lodgings shall continue fit for habitation during the term.

APPEAL from the judgment of His Honour Judge Chalmers sitting as commissioner of assize.

In March, 1894, the defendant let to the plaintiff certain furnished apartments in a house at Bettws-y-Coed. Subsequently, and while the plaintiff was occupying the apartments with his family, a grandchild of the defendant's who was living in the house became ill with scarlet fever, and the plaintiff's wife and child were infected and took the fever. The plaintiff was put to expense for medical attendance and nursing and in other ways, and he claimed to recover such expenses as damages for breach of an implied promise that the apartments were fit for habitation.

At the trial of the case the jury found, in answer to questions left to them that the house was healthy at the time of the letting and entering on occupation; that the plaintiff's wife and child contracted scarlet fever at the defendant's house during occupation; that the defendant knew that his grandchild had scarlet fever and concealed that fact from the plaintiff; and they assessed damages at 31*l.* 19*s.* The learned commissioner subsequently gave judgment for the plaintiff.

The defendant appealed.

Marshall, Q.C., and *W. B. Yates*, for the defendant. The cases shew that there is a warranty in the case of a furnished house

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that it shall be fit for habitation at the time at which the tenancy is to begin: *Smith* v. *Marrable* (1); *Wilson* v. *Finch Hatton* (2); but there is no authority for saying that there is an implied agreement that this state of things shall continue. It would not be reasonable to imply such a condition, as the landlord may be at a distance, or the insanitary condition of the house may arise from circumstances that he cannot control. If no such warranty can in general be implied, the fact that the landlord resides on the premises can make no difference. If the case for the plaintiff is put on the ground that he was not informed by the defendant that an inmate of the house was suffering from an infectious disease, the answer is that no such duty exists. [He cited also *Holder* v. *Soulby* (3); *Thompson* v. *Lacy* (4); *Ward* v. *Hobbs.* (5)]

E. H. Lloyd (*Jelf, Q.C.*, with him), for the plaintiff. A warranty should be implied from the relation of landlord and tenant that the lodgings are reasonably fit for habitation during the tenancy. This is in accordance with the judgment of Kelly C.B. in *Wilson* v. *Finch Hatton* (6), who treats the warranty as implied "from the very day on which the tenancy is dated to begin." Such an implication ought certainly to be made when, as in this case, the landlord is on the spot and supplies attendance and service. Further, when the change arose in the sanitary condition of the lodgings, there was a duty on the part of the defendant to inform the plaintiff directly he himself knew that fact.

LORD ESHER M.R. In this case we are asked to imply a condition or duty in a contract in which neither is expressed. I differ from the conclusion at which the learned commissioner has arrived, because the only ground on which the Court has a right to imply a condition in a contract is that it must have been in the contemplation of both parties. Can we say that both parties to this contract were of a mind that the condition

(1) 11 M. & W. 5; 12 L. J. (Ex.) 223.
(2) 2 Ex. D. 336.
(3) 8 C. B. (N.S.) 254.
(4) 3 B. & A. 283.
(5) 4 App. Cas. 13.
(6) 2 Ex. D. 336, at p. 343.

which we are asked to imply should exist? For some time the case was argued on the footing that by the mere relation of landlord and tenant there arises an implied condition that the house should be fit for habitation during the whole of the tenancy, so that a breach of the condition at any time during the tenancy would enable the tenant to throw it up—in which case he would only be liable for use and occupation. This point was given up, and the case was put upon such relations between landlord and tenant as existed in this case—that is, that the landlord was resident in the house and in a position to give attendance and service. How is it possible to deduce from stipulations as to such matters an implied condition that the house shall be in a sanitary condition? I can see no way of doing this, and consequently must say that such a condition does not exist.

KAY L.J. I am of the same opinion. I have no wish to add to the number of cases in which that which is not expressed in a contract is said by a Court of law to be implied. The cases have gone to this extent, that when a person hires a furnished house there is an implied condition that it shall be fit to live in at the time of the hiring. It is easy to see how that comes about, because the landlord, knowing the purpose of the tenant in hiring the house, must be taken to warrant that the house he is letting shall be reasonably fit for the purpose for which it is hired. To extend this warranty so as to make it apply to the condition of the house during the tenancy is not, to my mind, reasonable. The condition is that at the time of letting the premises they are in such a state that the tenant can take them. It is no defence on the part of the landlord to an action for breach of the condition that he did not know that the premises were otherwise than fit for occupation, because he could ascertain, and ought to have known. If the condition is extended, so as to apply if the premises become insanitary during the term, the landlord would be in a different position. He may be at a distance and know nothing as to the state of the house, or it may become insanitary from causes over which he has had no power or control. The rule at best is extremely artificial,

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because it does not extend to unfurnished lodgings; and I am certainly not inclined to extend it beyond the decision in *Smith* v. *Marrable*. (1) Another point argued was that, supposing no such condition can be implied, still there was a duty on the part of the landlord to communicate with the lodger so as to give him an opportunity of leaving when the lodgings became insanitary. No doubt this would be a very proper thing to do, but we have to find whether there is a legal duty to do it. It is impossible to infer such a duty from the mere relation of landlord and tenant, for the former may be far away and unacquainted with what is occurring. Then it is said that in this case the landlord has supplied the tenant with attendance; but I think it is impossible to imply the duty from that fact simply. This argument, therefore, fails, and the defendant is entitled to judgment.

A. L. SMITH L.J. This is an action brought by a gentleman who took furnished lodgings of the defendant to recover damages on the ground that the house became unfit for occupation by reason of an outbreak of scarlet fever during the tenancy.

The first point in the case is that which was raised in *Smith* v. *Marrable* (1) and *Wilson* v. *Finch Hatton* (2), the question being whether the house was fit for occupation at the time at which the tenancy was to begin. This was left to the jury, who found that it was; and I should have thought that finding made an end of the case. The two cases I have named shew that if the house being a furnished house is not then fit for occupation the tenant is entitled to rescind the contract. The learned commissioner went wrong in reading the decision in *Wilson* v. *Finch Hatton* (2) as if it established that the implied warranty was not confined to the fitness of the house for habitation at the commencement of the term. To extend such a warranty to the whole term would be most unreasonable. To do so would lead to this—that if the term were for twelve months and the house became uninhabitable in the last month, the tenant might then rescind the contract and refuse to pay the rent reserved. The mistake has arisen in giving undue effect to an expression used by

(1) 11 M. & W. 5; 12 L. J. (Ex.) 223. (2) 2 Ex. D. 336.

Kelly C.B. in *Wilson* v. *Finch Hatton*. (1) That learned judge said (2): "There is an implied condition that a furnished house shall be in a good and tenantable condition, and reasonably fit for human occupation from the very day on which the tenancy is to begin." In that case the tenant was entitled to enter into occupation on May 7, and she came, and, finding unpleasant smells, declined to occupy the house. Thereupon the landlord came in and occupied the house for some weeks while he was putting it into a habitable condition. The observation of Kelly C.B. was directed to this, that the plaintiff was entitled to enter into occupation of the house on May 7, and that if it was not in a fit state for occupation until the 26th she did not get what she had bargained for. The word "from" used by the learned judge in the sentence I have quoted has no reference to the continuance of the house in a fit condition for occupation after May 7, but only to its then condition, and his judgment, as is apparent from earlier passages, did not go beyond the decision in *Smith* v. *Marrable*. (3)

It was also argued that there was a duty on the part of the landlord to inform the tenant of the fact that the house had become insanitary. It was admitted by the learned counsel that this duty could not arise from the mere relationship of landlord and tenant; but it was said that it arose from the relationship established by the facts of this case. This is the first time such a duty has been suggested: there is no authority for the suggestion, and I must decline to give it effect.

Appeal allowed.

Solicitors for plaintiff: *Belfrage & Co., for Chamberlain & Johnson, Llandudno.*

Solicitors for defendant: *Rowliffes, Rawle & Co., for Griffith & Allard, Llanrwst.*

(1) 2 Ex. D. 336. (2) 2 Ex. D. 336, at p. 343.
(1) 11 M. & W. 5; 12 L. J. (Ex.) 223.

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July 12, 30.

[IN THE COURT OF APPEAL.]

THOMAS *v.* LULHAM.

Landlord and Tenant—Distress for Rent—Waiver of Right of Re-entry—Action to recover Possession—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 210.

A distress for rent levied by a landlord does not operate as a waiver of his right of re-entry for non-payment of that rent so as to prevent him from maintaining an action to recover possession of the demised premises under s. 210 of the Common Law Procedure Act, 1852.

Cotesworth v. *Spokes* (10 C. B. (N.S.) 103) is not inconsistent with *Brewer* v. *Eaton* (3 Doug. 230).

Decision of Mathew J. reversed.

Appeal by the plaintiff against the judgment of Mathew J. at the trial of the action.

The action was by a landlord against his tenant to recover possession of the demised premises on the ground of forfeiture for non-payment of rent.

In the year 1884 the plaintiff demised to the defendant the house No. 19, New Oxford Street, for the term of twenty-one years, at the rent of 130*l.* payable on the usual quarter-days, with a proviso for re-entry if the rent remained unpaid for twenty-one days after it became due, whether demanded or not. Upon March 25, 1894, one quarter's rent was due and of it 9*l.* 9*s.* remained unpaid, and at Midsummer and at Michaelmas, 1894, two further quarters' rent also became due and remained unpaid. Upon November 22, 1894, the plaintiff distrained, but was only able to realize by the distress such an amount as left more than half a year's rent still due, and he thereupon, upon November 26, 1894, issued the writ in this action against the defendant. Mathew J. held that by distraining upon November 22, 1894, the plaintiff had waived the forfeiture, and gave judgment for the defendant.

The plaintiff appealed.

Cavanagh, for the plaintiff. The levying of a distress is not

in this case a waiver of the right of re-entry for non-payment of rent which is reserved by the lease, the distress being insufficient: *Brewer* v. *Eaton*. (1) In that case the proceeding was under s. 2 of 4 Geo. 2, c. 28, and s. 210 (2) of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which is now in force, is a re-enactment of s. 2 of 4 Geo. 2, c. 28. At common law, no doubt, the distress would operate as a waiver of the forfeiture; but in order to enforce the remedy given by the statute it is necessary first to levy a distress, for the plaintiff could not otherwise prove at the trial that the distress was insufficient. The distress cannot, therefore, operate as a waiver. In *Cotesworth* v. *Spokes* (3) there was not half a year's rent in arrear after the distress, and that was the ground of the decision. In *Shepherd* v. *Berger* (4) the proviso for re-entry was "if and whenever" any one quarter's rent should be in arrear for twenty-one days and no sufficient distress could be levied, and it was held that the lessor had a right of re-entry as often as at any moment of time the two conditions named existed. The words "if and whenever" are equivalent to "as often as it shall happen that" in s. 210.

Æneas Mackintosh, for the defendant. Sect. 210 of the Common Law Procedure Act, 1852, does not expressly alter the common law that a distress for rent is a waiver of a right of re-entry, nor does it alter it by implication. The only alteration is in matters of procedure. The learned judge was of opinion that the distress was not put in to satisfy the statute. *Brewer* v.

(1) 3 Doug. 230.

(2) By s. 210, "In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises. . . . and if it shall be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded and a re-entry made."

(3) 10 C. B. (N.S.) 103.

(4) [1891] 1 Q. B. 597.

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Eaton (1) is of doubtful authority, and was practically overruled by *Cotesworth* v. *Spokes*. (2)

Cur. adv. vult.

July 30. KAY L.J. read the following judgment:—The statute 15 & 16 Vict. c. 76, s. 210, seems to me to mean that a landlord who has power to re-enter for non-payment of rent may recover in ejectment, notwithstanding that he has distrained for that rent, if the distress did not produce sufficient to pay the rent, but left half a year's rent still due. In this case the landlord had a right of re-entry if any quarter's rent should be in arrear twenty-one days. Two quarters' rent and part of a prior quarter's rent were due. The landlord distrained. The distress was not sufficient to pay the unpaid balance of the first quarter's rent. Therefore, when he brought the action, half a year's rent was due, and the statute applies and enables him to recover notwithstanding the distress. This was the construction put upon the statute of George II. in *Brewer* v. *Eaton*. (1) It was argued that putting in the distress waived the right of re-entry at common law, and that the statute does not apply where a distress has actually been levied. The material words are, "If it shall be proved upon the trial that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due." How could it be said that no sufficient distress was to be found without distraining? Goods on the premises are not a distress until they are distrained, and the landlord cannot tell what is to be found on the premises without putting in a distress. He has no right to enter merely to see what goods are there. The statute evidently contemplates an actual distress, and expressly authorizes the ejectment under the proviso for re-entry, notwithstanding such distress, if half a year's rent remains due. But reliance was placed upon the language used by the late Vaughan Williams J. in his judgment (in 1861) in *Cotesworth* v. *Spokes*. (2) In that case a lessor, having a power of re-entry, distrained for three quarters' rent, and after realizing the distress less than half a year's rent remained due. He then brought

(1) 3 Doug. 230.

(2) 10 C. B. (N.S.) 103.

ejectment; but it was held that, as half a year's rent was not due, the case was not within the statute, and the action was not maintainable. The power of re-entry, by the terms of the lease, was if a quarter's rent should be in arrear for twenty-one days. The three quarters' rent were due at Michaelmas, 1860—i.e., September 29. The distress was put in on October 2, that is, within twenty-one days from that date. Ejectment was brought on November 2, after the expiration of twenty-one days; but, part having been paid by the distress, there was not a right of re-entry for half a year's rent at the end of the twenty-one days after Michaelmas, and Vaughan Williams J. said that the distress was a waiver, because it was for the rent up to Michaelmas, as to the last quarter of which there was no right of re-entry at the time of the distress, because the twenty-one days had not expired. But, if the distress had been confined to the rent due at Midsummer, there would have been no waiver, because as to that the forfeiture had actually occurred. In the present case it is unnecessary to express any opinion as to this part of the judgment, which was not the ground of the decision before us. Two quarters' rent and part of a third were due on September 29, and the distress was put in on November 22, more than twenty-one days after the last of the three quarters' rent became due, and therefore that point does not arise.

A. L. SMITH L.J., after stating the facts, continued:—It is conceded by the plaintiff that at common law the distress operated as a waiver of the forfeitures which occurred on the non-payment of the rent, and the question is whether, notwithstanding this distress, the plaintiff, by reason of the provisions of sect. 210 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), is entitled to maintain this action. [The Lord Justice read the section.] To bring himself within the section the landlord must prove, first, the relationship of landlord and tenant; secondly, that he has by law the right to re-enter for non-payment of rent; thirdly, that, having distrained, he has been unable thereby to satisfy the rent due; and, lastly, that there was half a year's rent due when he served the writ of ejectment. Upon proof of these things by the landlord, then, in

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my judgment, the section enacts that he may proceed against his tenant and recover in ejectment, whether he had legally demanded the rent or not; but to avail himself of the section the above-mentioned four requisites must be proved. That this is the true reading of the section appears from *Brewer* v. *Eaton* (1), in the year 1783, where Lord Mansfield and the Court of King's Bench, upon 4 Geo. 2, c. 28, s. 2 (an equivalent section to sect. 210 of the Common Law Procedure Act, 1852), held that, though at common law the distress would have operated as a waiver of the forfeiture incurred by the non-payment of the rent, yet in a case which came within the statute it was not so, for the statute required the landlord to prove on the trial that no sufficient distress was to be found on the premises countervailing the arrears due, and that a distress, which it was necessary for the landlord to make in order to complete the title given him by the statute, was no waiver. It is said, however, that this case was overruled by the Court of Common Pleas in *Cotesworth* v. *Spokes* (2); but this is not so. That case decided that for a landlord to bring himself within the section he must prove that half a year's rent was in arrear at the time of the service of the writ. A passage at the end of the judgment (which was delivered by Vaughan Williams J.) was pressed upon us to shew that the forfeiture was waived in the present case by what the landlord had done; but, in my judgment, though the passage is hard to understand, it does not decide this, and I must point out that it was not competent for the Court of Common Pleas to overrule the Court of King's Bench, and it is not correct to say that it has done so. It should be noted that in *Cotesworth* v. *Spokes* (2) the distress was within the twenty-one days, which is not so in the present case; but, be this as it may, in my judgment the case leaves *Brewer* v. *Eaton* (1) untouched upon the point now under consideration. The Court of King's Bench put the true construction upon the section, which has apparently been acted upon for over one hundred years, and, as the plaintiff has proved the requirements of sect. 210, he is entitled to judgment. The appeal must be allowed, and judgment given for the plaintiff, with costs here and below.

(1) 3 Doug. 230.

(2) 10 C. B. (N.S.) 103.

LORD ESHER M.R. I agree with the judgments which have been read by my learned brethren. My view is that the old common law has not been altered, and that the receipt of rent by a landlord still operates as a waiver of a forfeiture previously accrued. But, in my opinion, the statute has given to the landlord a new, original, and independent right, and I think that under the statute the plaintiff was entitled to levy the distress, without thereby waiving his right of re-entry.

Appeal allowed.

Solicitors: *A. J. Thomas; A. Mewburn Walker.*

W. L. C.

[IN THE COURT OF APPEAL.]

PALMER *v.* BRAMLEY.

Landlord and Tenant—Bill of Exchange given for Rent—Suspension of Right of Distress.

The fact of a landlord taking a bill of exchange from his tenant for rent due is some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill.

APPEAL from the judgment of a Divisional Court on appeal from the county court of Leicestershire.

The action was one of replevin. It appeared that one Knight was tenant to the defendant of certain premises at a rent of 80*l.* a year payable quarterly at the usual quarter-days. On December 25, 1894, a quarter's rent fell due and was not paid. On February 14, 1895, the defendant suggested that Knight should give him a bill of exchange for 40*l.* payable two months after date in respect of the overdue rent and of the accruing quarter's rent, which Knight accordingly did. On February 20 Knight assigned all his property to the plaintiff as trustee for the benefit of Knight's creditors. On March 19, during the currency of the bill of exchange, the defendant put in a distress for the quarter's rent due in the previous December. The plaintiff thereupon brought this action. The county court judge considered that he was bound by the decision in *Davis* v.

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Gyde (1) to hold that the mere giving of the bill was no evidence of the suspension of the right of the landlord to distrain. He therefore withdrew the case from the jury, and entered judgment for the defendant.

The plaintiff appealed.

The Divisional Court (Wright and Kennedy JJ.) directed a new trial on the ground that *Davis* v. *Gyde* (1) was not an authority that an agreement to suspend the landlord's remedy by distress may not be inferred from the fact of his taking a bill or note for the rent due. Leave to appeal was given, and the defendant appealed.

T. H. Walker, for the defendant. The mere fact of a bill being given by the tenant and accepted by the landlord is not evidence of an agreement by him to suspend his right of distress: *Davis* v. *Gyde*. (1) Such an agreement must be proved aliunde, and there was no evidence in this case of any such agreement. The bill of exchange was a collateral remedy only; and though the fact of its currency might affect the landlord's right of action, it did not limit his right to distrain. [He also cited *Baker* v. *Walker* (2); *Drake* v. *Mitchell* (3); *Davidson* v. *Allen*. (4)]

Toller, for the plaintiff, was not called on.

KAY L.J. In this case I think we ought to uphold the decision of the Divisional Court. The defendant took a bill of exchange for the rent due and for the rent of the current quarter, and the bill would fall due some time after the expiration of the current quarter. This would give him an appropriate remedy for the rent due to him; and to my mind a possible inference to be drawn is that he agreed that on the bill of exchange being given his remedy by distress should be suspended. I do not say that the taking of the bill of exchange was conclusive evidence of such an agreement; all that it is necessary to say is that it was some evidence. If so, the county court judge should not have withdrawn the case from the jury. The question was what was the intention and object of the giving of the bill of

(1) 2 A. & E. 623.
(2) 14 M. & W. 465.
(3) 3 East, 251.
(4) 20 L. R. I. 16.

exchange; and all the facts, including the fact of the giving of the bill, should have been before the jury.

The case of *Davis* v. *Gyde* (1) was relied on by the county court judge. That case was decided on demurrer to a plea that a bill of exchange was given for rent, but not averring that it was taken in satisfaction or with the intention of suspending the landlord's remedy. On demurrer such a plea was held to be insufficient; but that is not an authority that the giving of the bill was no evidence of an agreement to suspend the landlord's right of distress, had such an agreement been averred.

I agree, therefore, with the Divisional Court that there must be a new trial.

A. L. SMITH L.J. There is no question before us of overruling *Davis* v. *Gyde* (1), which was rightly decided on the pleadings as they stood. In that case the averments were insufficient, and the judges pointed out that nothing was disclosed by the plea to raise the defence that the taking of the note suspended the right of distress. In *Baker* v. *Walker* (2) Parke B. says: "Where a man who has a judgment debt"—and rent is on the same footing as a judgment debt—"takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period." It is clear, therefore, that whether in the present case such an agreement must be inferred or not, at all events it may be inferred, and that is sufficient to make it requisite that the case should be left to the jury. It cannot be that in the absence of other evidence than the fact of the giving of the bill it is obligatory to hold that it was only given and taken as collateral security. The appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Pitman & Sons, for Hawby, Partridge & Waring, Leicester.*

Solicitors for defendant: *Tibbitts & Tickner, for Harvey & Clarke, Leicester.*

(1) 2 A. & E. 623.

(2) 14 M. & W. 465.

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1895

July 3.

[IN THE COURT OF APPEAL.]

G. E. DOBELL & CO. *v.* THE STEAMSHIP ROSSMORE COMPANY, LIMITED.

Ship—Bill of Lading—Exemption of Owner from Liability—Owner exercising due Diligence to make Vessel Seaworthy—Negligence of Agents—Act of Congress of February 13, 1893 (*c.* 105).

Goods were shipped under a bill of lading which incorporated by reference an Act of Congress by which, if the owner of a ship shall exercise due diligence to make the vessel in all respects seaworthy, and properly manned, equipped, and supplied, neither the vessel, her owner, agent, or charterers shall become liable or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel. The owner of a vessel supplied proper equipment and appointed a competent ship's carpenter, but by the negligence of the carpenter the ship was allowed to go to sea in an unseaworthy condition, by reason whereof a part of the cargo was damaged during the voyage. In an action by the owner of the damaged goods against the shipowner:—

Held, affirming the judgment of Lawrance J., that to exempt the shipowner from liability it was not sufficient merely to shew that he had personally exercised due diligence to make the vessel seaworthy, but that it must be shewn that those persons whom he employed to act for him in this respect had exercised due diligence; and that, therefore, the negligence of the ship's carpenter prevented the exemption from applying, and the shipowner was liable.

Appeal from the judgment of Lawrance J. at the trial of the cause without a jury.

The action was by the owner of goods shipped under a bill of lading at Baltimore for delivery in Liverpool and damaged in transit. It was admitted at the trial that there was a porthole to the ship above the water-line for use in loading cargo, and that if properly caulked and tightly screwed down it would not admit water when the vessel was at sea. Before she started on her voyage the porthole was closed by the ship's carpenter, but in such an imperfect manner that it was not watertight, and during the voyage, as the porthole was submerged from time to time by the rolling of the vessel, water got in through it and damaged a part of the cargo. The appliances for closing the

porthole were sufficient and in good order, and the competency of the ship's carpenter for the duties he had to perform was not disputed. The part of the ship into which the porthole opened was filled with cargo which would have to be removed before access could be obtained to the porthole. The bill of lading contained the following clauses: "Neither the vessel, her owners, agents, or charterers shall become, or be held responsible for damage, or loss resulting from faults, or errors in navigation, or in the management of said vessel, provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped and supplied. . . . not accountable for the unseaworthiness of the vessel at the commencement of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness) or otherwise howsoever. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893."

By the Act of Congress referred to, which is known as "The Harter Act" (1), it is enacted, "That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement, whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

Sect. 2: "That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America, and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of

(1) 52nd Congress, Sess. 2, c. 105: (1893) An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

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the owner or owners of the said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy, and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided."

Sect. 3: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Sect. 4: "That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be primâ facie evidence of the receipt of the merchandise therein described."

Sect. 5: "That for a violation of any of the provisions of this Act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two

thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States."

The learned judge gave judgment for the plaintiffs.

The defendants appealed.

Pickford, Q.C., and *Bateson*, for the defendants. The defendants provided proper equipment and all necessary appliances for closing the porthole, and they appointed a competent man to perform this work. They, therefore, are protected from liability by the incorporation into the bill of lading of clause 3 of the Harter Act. The provisions of that clause refer only to the exercise of due diligence by the owners themselves, and not to the diligence of their agents or servants.

Allowing the ship to sail with the porthole insufficiently closed was an error in navigation within the exceptions of the bill of lading: *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association.* (1)

In a case of *Franklin Sugar Refining Co.* v. *The Steamship Sylvia* (2), the United States Circuit Court of Appeals held that assuming those in charge of the vessel were negligent in not putting on an iron cover over the glass cover of a port which was broken during the voyage so that the cargo was damaged by sea-water, yet, as the owners had exercised due diligence to make the vessel seaworthy, they were not liable for losses arising during the transit from faults or errors in the navigation or management of the vessel, and that the failure to fasten the port was such a fault or error.

The provisions of clause 2 of the Harter Act, which forbid the insertion in a bill of lading of any covenant limiting the obligation to care for the cargo, apply to matters directly relating to the cargo such as stowage, ventilation, and the like.

Joseph Walton, Q.C., and *Carver*, for the plaintiffs. The

(1) 19 Q. B. D. 242. (2) Not reported.

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obligation under this bill of lading is that the owner and his accredited agents will exercise due diligence to send the ship to sea in a seaworthy condition. To cut down the obligation to a personal duty of the owner would be to nullify the effect of the clause in the great majority of instances in which, from the necessities of the case, the owner must act through agents. If that is the meaning of the proviso, all that would be necessary would be that the owner should appoint competent persons, and, whatever negligence they may be guilty of, he would escape liability.

The case in the United States Circuit Court of Appeals followed the decision in *Steel* v. *State Line Steamship Co.* (1), and it is plain the port could have been got at and closed with the iron cover directly the necessity arose. The exceptions relating to faults or errors in navigation or in the management of the vessel apply to the voyage, and do not touch the question of the seaworthiness of the vessel at starting.

[They cited *The Warkworth* (2); *The Ferro* (3); *In re Missouri Steamship Co.* (4); *Hedley* v. *Pinkney & Sons Steamship Co.* (5)]

Bateson, in reply.

LORD ESHER M.R. This case arises on a bill of lading of goods which were to be brought from America to England, and which were damaged on the way by reason of water having got into the ship through a porthole. The shipper of the goods has brought an action in respect of the damage done to them, and the shipowner contends that he is not liable, as the case comes within the exceptions of the bill of lading. That document has brought in by reference the provisions of an American Act of Congress, and what we have to do is to construe the bill of lading, reading into it as if they were written into it the words of the Act of Congress. If this is done it will have this effect: that some provisions will appear twice over, because they have put words extremely like those of the Act into the bill of lading, and then introduced the whole of the Act. That would, of course, do no harm, but it is clumsy to the last degree.

(1) 3 App. Cas. 72.
(2) 9 P. D. 20, 145.
(3) [1893] P. 38.
(4) 42 Ch. D. 321.
(5) [1894] A. C. 222.

The bill of lading has these words in it by way of exception, "Neither the vessel, her owners, agents, or charterers shall become, or be held responsible for damage, or loss resulting from faults, or errors in navigation, or in the management of said vessel," followed by this proviso, "provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped and supplied." The matter stands then, that unless the conditions of the proviso are fulfilled the exceptions which precede do not apply. They then introduce into their bill of lading the words of the Harter Act, which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading. In the 3rd section of the Act so incorporated the exception which is to relieve the shipowner is made to depend on the condition that the owner of the ship—that is, the owner of this particular ship—shall exercise due diligence to make the vessel in all respects seaworthy. If he does not do that the exceptions in his favour do not take effect. It is contended that the meaning of the clause is that if the owner personally did all that he could do to make the ship seaworthy when she left America, then, although she was not seaworthy, by the fault of some agent or servant, the owner is not liable. Can that be the meaning of the contract with regard to this ship? The owner was not at the port from which the ship sailed. The company who own the ship certainly was not there, and could not be there; but neither was the manager, or managing director, or some other person who might represent the company. No one was there who could possibly be called the owner; and this was known to both parties to the contract. It is obvious to my mind, from a consideration of the facts of this case, that the words of the 3rd section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port. Now, who was the agent at the port who was to look after the ship? If there was an agent there who employed the ship's carpenter he ought to have overlooked the carpenter and seen that the ship

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was seaworthy. If it was the carpenter who was the agent for this purpose, then it was his duty to see that the ship was seaworthy when she started. If she was not seaworthy when she started, it was the fault either of the agent employed to look after the carpenter or of the carpenter himself. In either case, there was a person employed by the owner, or on behalf of the owner, to see to the fulfilment of the condition that the owner had taken on himself by his contract, that the ship should be seaworthy when she started.

Now comes the question, Was the ship seaworthy when she started? There was a porthole through which water could come. If that had been all, and there had been the means of immediately closing the porthole, the matter would have been otherwise. But here there were no facilities for closing the porthole, for it could only be closed after the removal of a considerable part of the cargo; so that if there were rough weather or a storm, the water would be coming in all the time until the porthole could be got at and closed. It seems to me impossible to say that she was seaworthy at starting, so that she could perform an ordinary voyage without damage to the cargo. Her unseaworthiness was the fault of some one employed by the owner as his agent for the purpose of making the ship seaworthy before she started. That is the same as if the owner himself had been guilty of the negligence complained of. In this view of the case, neither *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (1), nor the decision in the case cited from the United States Circuit Court of Appeals, have any bearing on the matter. I do not think we are derogating from our decision in the former case. This particular case is peculiar to itself. The owner was not relieved from his responsibility, and the judgment of the learned judge at the trial must be supported.

KAY L.J. This bill of lading must be read as if the words of the Harter Act were set out at length in it. I confess my opinion as to the meaning to be placed on it has somewhat fluctuated during the argument; but upon the whole I think

(1) 19 Q. B. D. 242.

the result is that the owner of the ship meant, upon a certain condition, to exempt himself from the effect of any damage or loss resulting from faults or errors in navigation or in the management of the vessel. I agree with the argument that this means during the voyage, because of the contrast with the condition on which the exemption is given, by which the owner is to exercise due diligence to make the vessel in all respects seaworthy, and properly manned, equipped, and supplied.

The second point argued was that what happened was a fault in navigation or in the management of the vessel. There was a porthole in the ship intended to facilitate the loading of cargo. It was supplied with a cover which could be fastened down, so as to prevent water getting into the ship. The equipment was all perfectly right; but water got in because the porthole was insufficiently closed, and so the cargo was damaged. It was argued that the damage to the cargo was loss or damage resulting from faults or errors in navigation or in the management of the ship. It does not seem to me to be necessary to give any decided opinion on this point: but I incline to think, contrasting the various clauses of the bill of lading, that the expression "faults or errors in navigation or in the management of the said vessel" applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel, than to a matter of this kind.

The main question in the case is whether the owners fulfilled the condition upon which they are entitled to exemption, by the exercise of due diligence to make the vessel in all respects seaworthy, and properly manned, equipped, and supplied. It was not denied that she was unseaworthy in fact, and it could not be denied after the decision of the House of Lords in *Steel* v. *State Line Steamship Co.* (1) In that case Lord Blackburn said in effect that if there was a porthole in a ship left unfastened, and the cargo was stowed in such a way that it would take a considerable time to get at the porthole and fasten it, the ship would be unseaworthy; but that if it could be shut directly the necessity arose, the ship could not be said to be unseaworthy; and this view is confirmed by Lord Herschell in the more recent

(1) 3 App. Cas. 72.

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case of *Hedley* v. *Pinkney & Sons Steamship Co.* (1) We have, therefore, the strongest authority for saying that in this particular case the ship was unseaworthy, because it is admitted that this porthole could only be got at during the voyage by shifting the cargo—a matter which would involve a considerable expenditure of time and labour.

The essential question then is, Was there want of due diligence on the part of the owners? It is said that they did all that they could by providing proper equipment and appointing proper agents. It was the duty of the ship's carpenter to close this porthole, and they appointed a carpenter to whose competence no one makes any objection. It is said, therefore, that they personally exercised diligence, and thereby fulfilled the condition. I do not agree with this contention. It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent. It is obvious that the shipowner cannot himself with his own hands make the ship seaworthy; he must act through other persons; but I do not read the contract as exempting him from liability in the case of the negligence of the agents whom he employs to act for him in this respect. It seems to me that the owner has not fulfilled the whole of his duty within the terms of the contract merely by appointing a competent shipwright, and that he has not fulfilled the condition upon which alone he is entitled to exemption. I think, therefore, that the learned judge was right in holding that the owner was liable.

A. L. SMITH L.J. This is an action by the owner of goods against the shipowner on a bill of lading for damage to cargo, and the defence is that the latter is exempt by the terms of the bill of lading. There can be no doubt on the authorities that when the ship started on her voyage she was unseaworthy; but the defendant still claims to be exempt. The material part of the bill of lading is the clause which incorporates the Act of

(1) [1894] A. C. 222.

Congress of February 13, 1893, and the bill of lading must be construed as if the provisions of that Act were actually incorporated into it.

That brings me to consider what is the meaning of the sections of the Act. The purview of ss. 1 and 2 is that the shipowner shall not put into the bill of lading any clause exempting himself from damage to cargo by reason of the negligence of himself or his servants. As I read clause 3, it is a provision in favour of the shipowner, just as the first two clauses are directly against him. In clause 3 what is the meaning of the expression "If the owner shall exercise due diligence to make the vessel in all respects seaworthy"? Does it mean by himself, with his own hands and eyes? If that be the meaning of the clause, it could hardly be applied in one case out of fifty, for evidently the shipowner is not upon the spot to see to the matter. In my opinion, it does not mean by himself personally, but by himself and his agents; so that if by himself and his agents he exercises due diligence to make the vessel seaworthy, then he is not to be liable for loss or damage resulting afterwards from faults or errors in navigation or in the management of the vessel.

To get himself within the exemption which is in his favour the shipowner must make out that he has by himself or his agents exercised the due diligence which is required. In this case he cannot do so, because his agent in that behalf, as I understand the carpenter to be, has omitted to do that which a reasonably diligent man would do, and has let the ship go to sea with a porthole partially open, and with cargo stowed against it, so that it could not be got at without much labour and loss of time. It seems to me, therefore, that the defendants in this case have not brought themselves within the provision which would be an answer to this action.

It is not necessary to decide what is the interpretation of the expression "faults or errors in navigation or in the management of the vessel." I may say, however, that I think that the meaning of the section is that, if the shipowner by himself or his agents uses due diligence to make the ship seaworthy when she starts, he shall not be liable for what happens afterwards when the ship is at sea and he has no more control over her.

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A. L. Smith, L.J.

We have been pressed with the case of *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (1); but the sole point decided in that case was whether or not, upon a policy of insurance covering goods against losses which were incurred by the improper navigation of the ship carrying the goods, the fact of the ship sailing with a porthole partially closed was improper navigation of the ship. My brother Wills and myself held that it was, and our view was upheld by the Court of Appeal; but that decision has no application to this case, and for these reasons I think the defence fails.

Appeal dismissed.

Solicitors for plaintiff: *Walker, Son & Field, for Weightman, Pedder & Co., Liverpool.*

Solicitor for defendants: *Alfred Bright, for Bateson & Co., Liverpool.*

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1895
July 25.

[IN THE COURT OF APPEAL.]

O'NEIL *v.* ARMSTRONG, MITCHELL & CO.

Ship—Seaman—Contract of Service—Ordinary Voyage—Increased Danger—Uncompleted Voyage—Right to Wages.

The Japanese Government purchased in this country a war-ship, which was placed in charge of a master to navigate on their behalf from the Tyne to Yokohama. The plaintiff contracted with the master to serve as one of the crew for the voyage for a fixed sum. The ship sailed from the Tyne, but before she arrived at her destination news reached her that war had been declared by Japan against China. The plaintiff thereupon refused to continue to serve and left the ship. In an action brought by the plaintiff for his wages:—

Held, affirming the judgment of the Divisional Court, that the master was responsible to the plaintiff for the act of his principals in declaring war, and that, as the consequence of such declaration of war would be to expose the plaintiff, in the event of his continuing the voyage, to greater risks than those he had contracted to run, the plaintiff was justified in leaving the ship, and was entitled to recover the stipulated sum notwithstanding that the voyage was not completed.

APPEAL from a judgment of the Divisional Court, reported ante, p. 70.

To the facts as stated in the report of the case in the Divi-

(1) 19 Q. B. D. 242.

sional Court there should be added that the defendants entered into a written agreement with the captain, by which he was to "enter their service as captain of the torpedo gunboat *Tatsuta*, belonging to the Imperial Japanese Government, and to remain in the capacity of captain during the voyage from Newcastle-upon-Tyne to the port of Yokohama in Japan." The defendants were to pay the captain at a fixed rate per month from the time of his leaving the Tyne until his return to Newcastle, and to provide him with a passage to Newcastle-upon-Tyne from the place at which he was discharged from the ship. The agreement of the defendants with the Japanese Government was to take the vessel, on payment of a fixed sum, from this country to Japan. The captain on sailing hoisted the Japanese flag; and it was in evidence that at Aden, where the crew were informed that war had broken out between Japan and China, he said that the run was at an end, but that the men could stay by the month if they came to terms. The captain was not called to contradict this evidence.

The Divisional Court having affirmed the judgment of the county court judge in favour of the plaintiff (1), the defendants appealed.

Joseph Walton, Q.C., and *A. Lyttelton* (*G. J. Talbot* with them), for the defendants. The captain made an agreement with the defendants, and was in their service, and not in that of the Japanese Government, and he was not in any sense the agent of the Japanese Government, and he could not be made responsible for their act in declaring war. If he were their agent, the risk has not been altered, because the plaintiff by taking service in a foreign ship of war subjected himself to the chance of war being declared.

Sir W. Phillimore, and *S. T. Evans*, for the plaintiff.

LORD ESHER M.R. In this case an action has been brought by a seaman who had entered into a contract with the captain of a ship to serve on board on a voyage from Newcastle to Yokohama. It has been agreed that the case is to be treated as if

(1) Ante, p. 70.

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the action were brought against the captain. The plaintiff's case is, that during the voyage the Japanese Government, in whose service the captain was, declared war against China, and thus altered the position of the plaintiff by exposing him to two risks—one from the Chinese, and the other under the Foreign Enlistment Act. It cannot be denied that if this has happened through the act of those whom the captain was serving, the plaintiff had a right to leave the ship and to claim the full amount of his wages.

The dispute before the county court judge was whether the captain was in the service of the Japanese Government or of the defendants. The judge found in favour of the plaintiff; and that decision has been affirmed by the Divisional Court. The appeal really is on a question of fact, because there is no doubt about the law; and if the ship was a Japanese ship in the service of the Japanese Government, the plaintiff is in the right.

The ship was built by the defendants with the object that it should be a Japanese ship of war. That in itself would not make her a Japanese ship; and until she was delivered and treated as a Japanese ship of war she would not be one. It was agreed that the vessel should be sent by the defendants to Japan, and to carry that out an agreement was made with the captain to take her out there. If that had been all, and the captain had only proceeded to carry that out, in my opinion he would not have been captain of a Japanese ship of war, but of a ship under the sole control of the defendants. But I agree with the Court below in thinking that more was established as to the relations of the captain with the Japanese Government—enough, in the words of the judgment of the Divisional Court, to render further inquiry unnecessary. I think it clear that the captain did enter into the position of captain of this torpedo vessel under the Japanese Government, and the conclusion is irresistible that he did so with the knowledge and consent of the defendants and the Japanese Government. The boat being a torpedo boat, the captain took command of her as a vessel of war of the Japanese Government, and hoisted the Japanese pennant. The well-known meaning of that is that he treated the ship as belonging to the Japanese navy, and he could do nothing that

would more strongly shew that he was treating her as such a ship, and himself as captain of a Japanese war-vessel. If so, the captain was bound by the act of the Japanese Government in going to war; and when war was declared the sailors were subject to additional risks which they were not bound to run. The captain's principals had altered the risks of the voyage, and that entitled the seamen to say that the contract they had entered into had been altered, and that they had a right to leave the ship and to claim their wages for the whole voyage. I cannot disagree with the conclusions of the learned judge and the Divisional Court, and this appeal must be dismissed.

KAY L.J. There seems to be no dispute as to the law applicable to this case when once the facts are established. The defendants agreed with the captain to take the ship to Japan, and he engaged a crew, and amongst others the plaintiff as one of the seamen who were to assist in that voyage. It is not denied that during the voyage the ship was flying the Japanese flag from the time she left Newcastle till she arrived at Aden. That must have been with the knowledge of the defendants, and probably with the knowledge of the agent of the Japanese Government. At Aden the fact of war having broken out between Japan and China became known to the seamen, and the whole consequences of proceeding on the voyage to Japan became apparent. At that place the governor warned them of the double risk they ran from hostilities on the part of the Chinese and under the Foreign Enlistment Act. There was a complete alteration of the nature of the voyage, and new risks which the seamen had not agreed to. The law in such a case is laid down by Blackburn J. in *Appleby* v. *Myers* (1): "The plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shewn that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract." If this case is treated simply on what passed between the seamen and the captain, it is in evidence and not contradicted by the captain, who was not called as a

(1) L. R. 2 C. P. 651, at p. 661.

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witness, that the captain said at Aden that the run was finished, and thus put an end to the contract. The case thus comes exactly within one branch of the sentence that I have just quoted.

Another view is that the question whether the captain is liable depends on whether he was in the employ of the Japanese Government. He was engaged by the defendants, and the agreement was put in by which he was to take the ship out to Japan and to be paid by the defendants at a certain rate. But that is not all, for the captain knew that he had other masters, because he treated the ship from the first as a Japanese ship. He did not treat the defendants as his sole masters, but acknowledged the Japanese Government also as his masters. There was thus evidence on which the learned county court judge might act in treating the declaration of war as an act of the principals of the captain of the ship, thus bringing the case, for another reason, within the rule laid down by Blackburn J. in *Appleby* v. *Myers*. (1) I agree, therefore, with the judgment of the Divisional Court, and am of opinion that the appeal should be dismissed.

A. L. SMITH L.J. The question in this case is whether there was evidence on which the county court judge could hold that the captain of the torpedo boat, built by the defendants for the Japanese Government, and which became their property in the Tyne, was in the employment of that Government. If there was, it is not contested that the plaintiff is entitled to the whole amount of the wages for which he contracted because, by the conversion of the voyage by the Japanese Government from one with the risks incident to peace to a voyage with those incident to war, the peace adventure had become frustrated and put an end to.

It seems to me that the learned county court judge assumed rather than found that the captain was the agent, as he called it, of the Japanese Government. That fact was disputed in the Divisional Court; but it was there held that, though the exact position of the captain was not clearly proved, enough had been established as to his relation to the Japanese Government to shew that he was their captain, and to render further inquiry

(1) L. R. 2 C. P. 651.

unnecessary. If the case had rested solely on the agreement between the captain and the defendants, I should have thought that there was no evidence that he was a servant of the Japanese Government. But the case does not by any means rest only on that. It is true that in the agreement it is expressly stated that the captain is to enter into the service of the defendants; but, on the other hand, it is admitted that the ship was the property of the Japanese Government; and no sooner did the captain get on board in the Tyne than he ran up the Japanese flag. He was thus in command of a Japanese warship and flying the Japanese flag. The matter does not stop there, for the conduct of the captain at Aden is also consistent with his being in command of a Japanese war-vessel on behalf of the Japanese Government. The evidence is uncontradicted that, when the proclamation of neutrality was read on board at Aden, and the men had learned of the breaking out of the war and of the additional risks to which they would be exposed, the captain said that the run was over, and offered to arrange other terms with them on which they should continue on board. I answer the question whether there was evidence on which the county court judge could find that the captain was in the employ of the Japanese Government by saying that there was such evidence; and I therefore agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *P. G. Robinson, for T. H. Smirk, Newcastle-on-Tyne.*

Solicitor for defendants: *Crossman & Prichard, for Dees & Thompson, Newcastle-on-Tyne.*

A. M.

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1895
July 5.

[IN THE COURT OF APPEAL.]

In re SAUNDERS.
Ex parte SAUNDERS.

Bankruptcy—Jurisdiction—Pension made inalienable by Indian Law—Order for Payment to Trustee—Exercise of Discretion—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 53, *sub-s.* 2.

The Court has jurisdiction under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, to order payment of a pension which is made inalienable by Indian legislation to the trustee in bankruptcy of the holder. There is no rule of law that in the case of an Indian pension such an order ought never, as an exercise of discretion, to be made; the discretion to make the order is absolute, and should be exercised in each case with regard to the facts of that particular case.

APPEAL from the decision of a Divisional Court (Vaughan Williams and Kennedy JJ.). (1)

The bankrupt, who was a retired major-general of the Madras Staff Corps, had a pension, which had been granted to him under the Indian Pensions Act, 1871, in respect of military service in India. An order was made in the Wandsworth County Court directing payment to the trustee in his bankruptcy of a part of such pension. Upon appeal to the Divisional Court, that order was reversed, the learned judges expressing the opinion that, although there was jurisdiction to make the order, such an order should never be made in the case of an Indian pension, which was intended to be made inalienable by the Indian legislature. The trustee appealed by leave.

Carrington (*Herbert Reed, Q.C.*, with him), for the trustee. There is clear jurisdiction to make the order under s. 53, sub-s. 2, of the Bankruptcy Act, 1883. The Divisional Court were wrong in saying that the discretion of the Court should never be exercised in favour of making an order in the case of an Indian pension. The mere fact that the Indian legislature intended the pension to be inalienable does not justify the Court in laying

(1) Ante, p. 117.

down a rule which will impose an absolute fetter on the exercise of the discretion of a Court in subsequent cases. Even in India there is no absolute right in the officer to receive the pension, for by the Insolvent Debtors (India) Act (11 & 12 Vict. c. 21), s. 27 (which was not cited in the Divisional Court), the Court in India may order an insolvent to pay a portion of his pension to his assignee.

Muir Mackenzie, for the bankrupt, admitted that there was jurisdiction to make the order, and was proceeding to argue that it should not have been made in the particular case, but was stopped by the Court.

LORD ESHER M.R. I am of opinion that this appeal should be dismissed. It is perfectly clear, and is indeed admitted, that the Bankruptcy Court had jurisdiction to make the order asked for, and I think that no rule of law should be laid down which would in the least degree fetter the exercise of that discretion of the Court. In no appeal, whether from that Court, or from any other Court, where the Court below has a discretion and admittedly has jurisdiction, will the Appeal Court lay down any such rule: where the Court to which the appeal is brought differs from the judge who has exercised his discretion it will say that it should not have been exercised in that particular way, and that the Appeal Court would not have so exercised it; no hard and fast rule should be laid down that the discretion should never be exercised. In the present case the county court judge exercised his discretion, and the Divisional Court differed from him as regards that exercise of discretion; and if they were clearly of opinion that they would not have exercised it in the same way they were justified in so differing, for otherwise there could be no appeal against an exercise of discretion. Under what circumstances are we now asked to overrule the exercise of its discretion by the Divisional Court?

The bankrupt is an officer of the Indian army, who has served for a long period and is in receipt of a pension bestowed by the Government of India in respect of his services; in case of emergency he may be called upon to serve again. It was the

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obvious intention of the Indian legislature, as was pointed out by Lindley L.J. in *Lucas* v. *Harris* (1), that these officers should not be subject to any interference in the enjoyment of their pensions, although under the Imperial Act of 11 & 12 Vict. c. 21, s. 27, there is power in the case of an insolvency in India to make an order interfering with such enjoyment. We are here dealing with an officer having a pension and no other means of his own; he has a wife and family, and his wife has a freehold house and other means to the extent of the interest in a capital sum of 500*l*. The case really comes to this—that the wife has nothing with which to pay the annual expenses of the household, and the husband has nothing but his pension out of which to pay those expenses (for all of which he is legally liable). In such a case, if I were exercising my discretion, I should decline to make an order to set aside any part of the pension. If the circumstances were different, for example, if the wife had a considerable income of her own, so that the whole of the officer's pension would be available for his own personal expenses as pocket-money, I should say that some part of it should be set aside. I agree with the way in which the Divisional Court has exercised its discretion, and should in a similar case exercise my discretion in a similar way; I will go further, and say that, if in a similar case the Divisional Court were to order a portion of the pension to be set aside, I should not agree with that exercise of discretion. I desire to lay down no binding rule of law to fetter the discretion of any Court to which such an application may be made. In the judgment of Vaughan Williams J. there are one or two phrases which, I think, go a little too far; for instance, where he says, "In my opinion the Courts ought not, with regard to an Indian pension, to make any order under s. 53," and if this is to be read as meaning that, whatever may be the other circumstances of the case, an order under s. 53 should never be made in the case of an Indian pension, I do not agree with it. Similarly, I think that Kennedy J. goes too far in saying, "We think that the discretion should not be exercised by making an order under that section," if by that is meant that an order should never be made whatever may be the circum-

(1) 18 Q. B. D. 127.

stances of the case. For the reasons I have given I think that this appeal should be dismissed.

KAY L.J. I am of the same opinion. Both the county court judge and the Divisional Court held (and I agree with them) that there was jurisdiction to make the order. The language of s. 53, sub-s. 2, of the Bankruptcy Act, 1883, is very wide, and gives a very large discretion both as to whether an order shall be made at all and as to the kind of order which may be made; and I agree with the Master of the Rolls that an Appeal Court differs very reluctantly from the exercise by the Court below of so large a discretion. But unfortunately in the judgments of the Court below in this case there are expressions from which I differ very emphatically indeed. Where there is a discretion of this kind to be exercised no Court will lay down a general rule which will bind another Court when it is called upon to exercise its discretion; the discretion is meant by the legislature to be exercised in each individual case upon the particular facts of that case. There can hardly be two cases so alike in their facts that the one should govern the other: and if a Court attempts to lay down a rule for the exercise of the discretion of other Courts, it is obvious that it is attempting to fetter the exercise of their discretion when they are called upon to exercise it.

How ought the Court to exercise its discretion in the present case? It is of course a judicial discretion, and a Court of Appeal will ask if it has been judicially exercised in a way that it can approve. When an appeal is on a matter of discretion any Court differs with great reluctance from the Court whose decision is under review. We are relieved, however, of that difficulty in the present case, for the county court judge has exercised his discretion in one way, and the Divisional Court have exercised theirs in another. We must look at the facts of the particular case, and without attempting to lay down any general rule which would fetter another Court exercising its discretion under s. 53, we must say how the discretion should be exercised in this case. We have here an officer who brought an action, and, being defeated, was ordered to pay the costs; he did not pay them, and was made a bankrupt. Under that bankruptcy an application was

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made for an order that he should set aside a part of his pension to answer the claims of his creditors in his bankruptcy. The net amount of his pension was 330*l.*, and he had no other means; it was said that his wife had invested money in freehold houses, but there was no evidence that she had any income other than the interest of a sum of 500*l.* In that state of facts, is it right to order a part of the pension to be paid to the trustee in bankruptcy? It is said that upon cross-examination it appeared that the bankrupt paid about 150*l.* for the household expenses, and spent about 150*l.* on himself, his clothes, club subscription, &c., and that as he spent about as much on himself as on the house it was right that he should be ordered to set a portion of his pension aside. But it also appears that he was never asked how he spent the 150*l.*—what expenses he paid out of it; and if he had been asked it might well be found that it was spent on other necessaries than clothes. In this case I do not think it would be a proper exercise of discretion to order a portion of the pension to be set aside. It is said that if we look at the Indian legislation we shall find a reason why such an order should be made; but I fail to find it. The statute 11 & 12 Vict. c. 21, applies to insolvents in India, and if a man is insolvent in India the Court there has the same power as the Bankruptcy Court has here under s. 53 of the Bankruptcy Act, 1883; there is, therefore, no hard and fast rule of Indian legislation on the point. Reference has been made to *Lucas* v. *Harris* (1); but that was not a bankruptcy case. There an officer was in receipt of an Indian pension, and it was sought to obtain an order for a receiver in aid of execution so as to get hold of part of the pension, and it was right in that case to consider the Indian legislation, under which there was no power to appoint a receiver in that country by way of execution. The Court was there asked to do in England what could not be done in India, and the case has no bearing on the present one. Therefore, though the language of the judges in the Divisional Court goes somewhat too far, their actual decision was a better exercise of the discretion under s. 53 than was that of the county court judge.

(1) 18 Q. B. D. 127.

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In re SAUNDERS. *Ex parte* SAUNDERS.

A. L. SMITH L.J. I agree. The case is of some importance, for the Divisional Court seems to have laid down the rule that no order should ever be made under s. 53 with regard to an Indian pension. If that was their intention, I cannot agree with them. As regards the exercise of such a discretion, it is a generally recognised rule of practice that, where a retired officer has only his pension to live upon, the Court or judge will be loth to order him to set aside any part of it; but there is no rule of law to that effect: it is a rule of practice which, if I were exercising my discretion as a judge of first instance, I should certainly follow. If the circumstances, however, were different to what they are in this case, and the officer had other sources of income which would justify the making of the order, I should make it. Treating the judgment of the Divisional Court as a mere exercise of their discretion, I concur in the dismissal of this appeal.

Appeal dismissed.

Solicitors for trustee: *Ashurst, Morris, Crisp & Co.*
Solicitor for bankrupt: *George Twynam.*

W. J. B.

[IN THE COURT OF APPEAL.]

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FULLER *v.* THE BLACKPOOL WINTER GARDENS AND PAVILION COMPANY, LIMITED, AND ANOTHER.

Copyright—Musical Composition—Dramatic Piece—Right of Representation—Notice of Reservation—Dramatic Copyright Act, 1833 (3 & 4 *Wm.* 4, c. 15), *ss.* 1, 2—*Copyright Act,* 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 20—*Copyright (Musical Compositions) Act,* 1882 (45 & 46 *Vict. c.* 40), *s.* 2—*Copyright (Musical Compositions) Act,* 1888 (51 & 52 *Vict. c.* 17).

To bring a musical composition within the provisions of the Dramatic Copyright Act, 1833, it must have the characteristics of a dramatic piece, and whether it has such characteristics must be determined in each case by the nature of the composition itself.

A song that does not require for its representation either dramatic effect or scenery is not a dramatic piece, although it is intended to be sung in appropriate costume on the stage of music-halls.

When a musical composition is published, in order to entitle the owner of the right of public representation or performance thereof to sue for penalties for the unlicensed performance of such composition, the right of

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representation or performance must have been reserved by notice printed on every published copy, as provided by the Copyright (Musical Compositions) Act, 1882; and this is equally the case where the musical composition is also a dramatic piece within the Dramatic Copyright Act, 1833.

APPEAL of the plaintiff from the judgment of Kennedy J. at the trial without a jury.

The plaintiff purchased from the composer the sole right of singing in Great Britain a song called "Daisy Bell." The song was published with a notice printed on each copy to the following effect: "This song may be sung in public without fee or licence except at music-halls." The defendants were a limited company, proprietors of the Blackpool Winter Gardens and Pavilion, and Holland, manager of the company. The theatre of the defendant company was not a music-hall; and Holland was the holder of a licence for theatrical performances in that theatre. He purchased a copy of the song with the above-mentioned notice printed upon it, and the song was sung at the theatre in a dramatic play or burlesque during the run of the piece. The song as published had on the title-page a picture of the plaintiff with a bicycle and dressed in the costume of a male cyclist.

The action was brought to recover the sum of 624*l.* as damages for the infringement by the defendants of the plaintiff's sole right of singing, representing, or performing the musical composition and dramatic piece called "Daisy Bell" without the consent in writing of the plaintiff first had and obtained.

At the trial there was a conflict of evidence whether the notice printed on the copies of the song had been authorized by the plaintiff, and the learned judge held that the plaintiff had authorized the printing of those words on the song as published. The learned judge was of opinion that in the case of a musical composition which is also a dramatic piece, the Copyright (Musical Compositions) Acts, 1882 and 1888, do not apply so far as the remedy against an infringer is concerned, and that the rights of representation are governed by s. 2 of the Dramatic Copyright Act, 1833. The learned judge came to the conclusion that the song was a dramatic piece as well as a musical com-

position on the grounds that in order to be understood it involved the impersonation by the singer of the character of a cyclist, and that it was intended, when the right of representation was assigned to the plaintiff, to be sung by her in that character, and in the costume indicated on the title-page. The inference to be drawn from the song itself and from the evidence was that it was a composition intended for the stage either of the theatre or of music-halls.

Treating the case as within the Dramatic Copyright Act, 1833, the defendants would have been liable to the penalty of 40*s.* for each occasion on which the song was performed; but they were entitled to rely on the printed notice as a written consent by the plaintiff to their performing the song, and judgment was accordingly entered for the defendants. The learned judge also stated that, although the point had not been taken, he was of opinion that the plaintiff, as against persons who had bought the song upon the faith of the notice on it, could not be heard to say that without any offer of compensation she had revoked the consent so as to make actionable conduct which had been induced by the previous consent.

The plaintiff appealed.

June 27. *Rufus Isaacs*, for the plaintiff, in support of the appeal. The notice on the song was a licence which did not give any right or interest in property, and was revocable. It was revoked at the time when complaint was made to the defendants as to the performance of this song at their theatre. It may be that the revocation of the licence would give rise to a claim by the licensee against the person who gave the licence; but that cannot affect the right to revoke. If there is such a right, and the licence was revoked, the defendants are liable in penalties for each time they caused the song to be sung. The song is a dramatic piece, as held by Kennedy J. on the authority of *Russell* v. *Smith* (1), *Clark* v. *Bishop* (2), and *Roberts* v. *Bignell* (3), within the definition in the Dramatic Copyright Act, 1833. (4)

(1) 12 Q. B. 217.
(2) 25 L. T. (N.S.) 908.
(3) 3 Times L. R. 552.
(4) 3 & 4 Wm. 4, c. 15, s. 1, enacts that "the author of any tragedy, comedy, play, opera, farce, or any

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Scrutton, for the defendants. The defendants have in effect bought the song with a statement that they may have it sung in their theatre. They have property in the copy of the song that they bought, and a pecuniary interest in its being sung at their theatre. But in fact the notice is not a licence, but a reservation of the right of representation only so far as music-halls are concerned; so that no question of revocation arises. It is a mistake to treat a mere song as a dramatic piece; but if this particular song could be so described, the authority given by the plaintiff by the notice on the printed copies is a sufficient consent in writing of the proprietor within s. 2 of the Dramatic Copyright Act, 1833, and the plaintiff cannot recover.

Rufus Isaacs, in reply.

Cur. adv. vult.

July 9. LORD ESHER M.R. In this case the plaintiff has become the owner of the sole right of singing a certain song in public. The defendants have caused the song to be sung at their theatre, and the action is brought to recover a large sum of money, the amount of the penalties to which it is said the defendants became subject each time the piece was sung. The plaintiff claims that the song is a dramatic piece within the Dramatic Copyright Act, 1833; and the learned judge has decided that it is so, but that the plaintiff consented to its performance, and he has given judgment for the defendants. I agree with the conclusion of the learned judge that there should be judgment for the defendants, but not on the same grounds.

I have come to the conclusion that this is not a dramatic piece within the meaning of the Act. It is a musical composition, the rights as to which are regulated by other Acts passed in the years 1842 and 1882. This song was written to be sung by one

other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom . . . . any such production as aforesaid. . . ."

person, and is a musical composition; but is it a dramatic piece? To say that it is dramatic is not sufficient, for we have to see whether it is a dramatic piece within the meaning of the Act, and therefore the description given by Lord Denman in *Russell* v. *Smith* (1) of what is dramatic does not seem to me to assist us.

The Dramatic Copyright Act, 1833, enacts that the author of any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment," is to have the sole liberty of representing it at any place of dramatic entertainment. The particular words of the Act are followed by general words which must be taken to indicate something of the same kind as the preceding words. If we look at those words we find "tragedy," not tragic story; "comedy," not merely something with a comic element in it; and these and the other things enumerated are things that are adapted for acting at a theatre or elsewhere. The general words must have a similar meaning attached to them; and to say that they include songs, or that songs are ejusdem generis with the things previously enumerated, is to my mind out of the question.

By the 20th section of the Copyright Act, 1842, the provisions of the Dramatic Copyright Act, 1833, are extended to musical compositions, but the definition of a dramatic piece of the last-mentioned Act is not extended to musical compositions. Only the provisions of the Act are so extended. The state of things under these Acts was certainly not satisfactory, and the Copyright (Musical Compositions) Act, 1882, recited that it was expedient to amend the law relating to copyright in musical compositions, and to protect the public from vexatious proceedings for the recovery of penalties for the unauthorized performance of the same. To effect this the Act provides, in the case where the right of public representation or performance of a musical composition and the copyright in it are vested in different owners, and the owner of the right of public representation desires to retain it, that he must give a notice to the owner of the copyright requiring him to print on every copy a notice that the right of public representation or performance is

(1) 12 Q. B. 217.

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reserved. It is perfectly plain that unless that is done the right is not reserved, and no penalties can be recovered.

I do not know that it is possible to define with precision what is a dramatic piece and what is a musical composition. A musical composition may be also a dramatic piece, as in the case of an opera, which, however, is excluded by s. 4 of the Copyright (Musical Compositions) Act, 1888, from the operation of that Act. Because, however a musical composition may be a dramatic piece, it does not follow that all are. To bring a musical composition within the Dramatic Copyright Act, 1833, it must have the qualities that belong to such dramatic pieces as are mentioned in that Act. Whether any particular subject-matter is only a musical composition, or whether it has also the characteristics of a dramatic piece, is a question of fact which must be submitted to a jury, if there is one, or determined as a question of fact by the judge if there is no jury. Treating this as a question of fact, what has this song in common with a dramatic piece? The fact that it is sung in costume does not make it a dramatic piece. If the dress of the singer could have that operation, the singer and not the author of the song would be the person who caused it to be a dramatic piece. The same may be said of the manner in which the singer treats the song. The question must be what was the character of the composition when it was first written and published. I can quite understand that it is possible that a thing to be performed by one person only may be a dramatic piece. But, whether the composition is to be sung by one or more persons, if a song is sung, and only a song, there is no performance of a dramatic piece; and that seems to me to have been the case here. The plaintiff herself dealt with this song as a musical composition, for she caused the notice to be printed on it restraining to a certain extent the public performance. It is now said on her behalf that she revoked the permission given by that notice. It is not necessary to determine whether she could revoke the permission given in the notice, though I rather incline to the opinion that she could not, or that, at all events, she could only do so by the publication of other copies of the song with a full reservation of all rights. If that can be done, this curious result would follow

that, unless all the existing copies could be called in, there would be two sets in existence, one with and the other without the reservation. However that may be, the truth is that the plaintiff never did revoke the authority given by the notice. Her case throughout was that she did not authorize the notice, and that has been found against her.

The conclusion I have come to is that this song was not a dramatic piece, and that the plaintiff has failed to shew that she is entitled to any penalties. The appeal will therefore be dismissed.

KAY L.J. read the following judgment:—This action was brought to recover 624*l.*, being 312 amounts of 2*l.* each, from the defendant company and their manager for 156 occasions on which the song of "Daisy Bell" was sung at the defendants' place of entertainment. This sum the plaintiff claims as proprietor of the sole right of singing or representing this song.

The song has been printed and published, both music and words. Upon the outside are printed the words, "This song can be sung in public without fee or licence, except in music-halls." This was done with the plaintiff's consent. The defendants' place of entertainment is not a music-hall, and is not licensed as such. The sung was sung in a burlesque which was performed there. The plaintiff was accustomed to sing the song in the costume of a boy cyclist, and a photograph of the plaintiff in that costume was outside the printed song. The plaintiff was accustomed also, it is said, to accompany the song with dramatic action, though the words do not seem to afford much scope for this.

If the song is to be treated as a musical composition under the Act of 1882, the 2nd section of that statute—which it is said applies to this case because the copyright in the composition belongs, not to the plaintiff, but to the author—requires the plaintiff to give to the owner of the copyright before publication notice to print upon every copy that the right of public representation is reserved; and no such notice was given, nor was anything printed to that effect, except the reservation of the right to sing the song in music-halls.

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It is argued, and the learned judge has felt himself bound by authority so to hold, that this song was a dramatic piece within 3 & 4 Wm. 4, c. 15, 5 & 6 Vict. c. 45, and 51 & 52 Vict. c. 17. The first of these statutes (the Dramatic Copyright Act, 1833) gives to the author of "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment," the sole liberty of representing the same; and any other person representing any such production at a place of dramatic entertainment without the consent in writing of the author or proprietor is liable for each such representation to pay 40*s*.

The Copyright Act, 1842, by s. 20 extends the benefit of the former Act to musical compositions, and gives to the owner of the right of representation the remedies given in the former Act; and by s. 2 "dramatic piece" is declared to include "every tragedy, comedy, play, opera, farce, or other scenic, musical or dramatic entertainment." The Copyright (Musical Compositions Act), 1888, enabled a Court to give less than 40*s*. if justice required it. I cannot read this series of statutes in any other sense than that if, in the case of a musical composition, the notice required by s. 2 of the Copyright (Musical Compositions) Act, 1882, is not given and printed upon the published copies, no penalty or damages can be recovered, because the right of public representation is not reserved, and, there being no right, there can be no remedy. If it be a musical composition which can be called a dramatic piece, it seems to me that the notice should still be given. The reason seems plain. When a song with the music is printed, every one who buys it has a right to suppose he may sing it anywhere—in a private house, or in a place of public entertainment—unless there is a notice on the song to the contrary. No one buying a tragedy or comedy would suppose himself at liberty to represent it—he would buy it only to read.

In *Russell* v. *Smith* (1), in 1848, a song called "The Ship on Fire" was held to be a dramatic piece, and a person who sung it at a place of public entertainment was held liable for penalties. The action was brought to recover 40*s*. for representing and performing the song at Crosby Hall, and one of the questions argued

(1) 12 Q. B. 217.

was that the song was not a musical composition within s. 20 of the Copyright Act, 1842, but that the musical compositions intended to be protected by that Act were only those composed for performance with dramatic pieces. The Court did not decide the question whether the Act was to be so restricted, because they considered that the song was a dramatic piece within the interpretation clause, s. 2.

In *Clark* v. *Bishop* (1), in 1872, a song was held to be a dramatic piece when its only value was derived from the singing and acting of it in character.

In *Wall* v. *Taylor* (2), in 1883, the question was whether the proprietor of a musical composition could maintain a claim for the 40*s.* penalty when it had been sung at a place which was not a place of dramatic entertainment; and it was held that he could, Cotton L.J. dissenting.

In *Roberts* v. *Bignell* (3), in 1887, it was held that a song called "Oh, Jenny dear!" set to music not of the proprietor's own authorship, was not a musical composition, but a dramatic piece, and that a mere verbal permission to sing it was an ineffectual gift, so that the proprietor, notwithstanding such permission, could recover the 40*s.* penalty. I have not found any other report of this case. I can scarcely believe that this report is accurate. If it was decided that because the words of the song were dramatic the music was not a musical composition, I respectfully differ from that decision.

These decisions, except the last two, were before the Copyright (Musical Compositions) Act, 1882. No case has decided that a song which is a dramatic piece is not also a musical composition, unless *Roberts* v. *Bignell* (3) did so. The words "musical composition" must refer to the music, not the words of the song, and the music without the words could hardly be called a dramatic piece. But even if it could, it is impossible to say that it is not a musical composition; and if it be, then, when the song and music are printed and published, the owner of the right of representation must reserve it by a notice printed upon each copy, otherwise, as I read those statutes, the right does not exist after such publication.

(1) 25 L. T. (N.S.) 908. (2) 11 Q. B. D. 102.
(3) 3 Times L. R. 552.

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This seems to dispose of the case. The plaintiff was evidently aware of the necessity of printing a notice upon each copy, because she has caused this to be done; but the only reservation made by that notice is of the right to sing the song in music-halls; and this the defendants have not infringed. The plaintiff has recently caused a reservation in larger terms to be printed on copies sold.

It was argued that the notice printed on each copy was a licence to sing the song anywhere except in a music-hall, that such licence was revocable, and that it was revoked. There was no revocation, or attempt to revoke. The objection raised was that the plaintiff never authorized the limited reservation which was actually printed. This was disproved. She did authorize it. But I do not agree that the printed notice was a licence. It was evidently intended to be a reservation in compliance with the Act of 1882.

This point seems not to have been argued before the learned judge. The appeal appears to be founded upon a suggestion made by him at the end of his judgment. The learned judge raises the question, and answers it by saying that even if it were a licence it could not be revoked against any person who had bought the song and made arrangements to perform it in a place which was not a music-hall. If it was a licence, I should not be prepared to differ from the learned judge; but, for the reasons I have given, I think that the point does not arise.

I agree that there should be judgment for the defendants, though I respectfully dissent from some of the reasons given by the judge in the Court below.

A. L. SMITH L.J. read the following judgment:—This action is brought by the plaintiff, who has acquired by assignment from the author the sole right of singing a song called "Daisy Bell," and is founded upon the Dramatic Copyright Act, 1833 (3 Wm. 4, c. 15), and the Copyright Act, 1842 (5 & 6 Vict. c. 45), the conjoint effect of which Acts upon the point in hand is, that if any person, without the consent in writing of the person who has the sole right of representing either a dramatic piece or a musical composition, does so, he is liable to a penalty for each representation of not less than 40*s.* and double costs.

It was found by Kennedy J. at the trial, and against this finding there is no appeal, that, in spite of the plaintiff's assertion upon oath to the contrary, the song "Daisy Bell" was published to the world with her consent in writing to its being sung anywhere excepting at music-halls, the inscription upon each copy, of which a large number were published, being: "This song may be sung in public without fee or licence, except at music-halls"; and it was shewn that the infringement complained of by the plaintiff was the singing, or causing to be sung by the defendants, the song within the terms of the consent given—namely, elsewhere than at music-halls.

This, which was the great issue in the cause, having been found against the plaintiff, she now appeals to this Court, and by her counsel argues, though the point was not taken before Kennedy J., and though it must now be admitted that consent in writing had in fact been given by the plaintiff to the defendants to sing the song as and when they did, that she nevertheless was entitled to have judgment entered for her, because, as she now alleges, she had revoked her consent, as by law she was entitled to do, before the defendants sang, or caused to be sung, the song which is the subject-matter of complaint, and that in these circumstances they had done so without the plaintiff's consent in writing.

To this the defendants made answer that the plaintiff was wrong in her facts: that she never did revoke her consent, for that the position the plaintiff had taken up was not that she revoked her consent, but that she had never given any consent at all, the consent printed upon the songs having been placed, as she said, thereon without her permission, which has been proved not to be the truth.

It appears to me that this answer of the defendants as to the facts is correct. It is one thing to withdraw a consent given, and quite another thing to assert that there never was any consent given at all, for in the one case a person is in the wrong if he continues the representation after the consent is lawfully withdrawn, and in the other he is in the right in contesting, as the defendants did, the false assertion that no consent had ever been given.

As it is established that the plaintiff never revoked her

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consent, which she had in fact given, it is wholly unnecessary to consider the question which was argued before us whether the consent given was in the circumstances revocable or irrevocable, for this is purely an academic point. But, even if the plaintiff could have revoked her consent and had done so, there is a further answer to this action, which is this: In the year 1882 the Copyright (Musical Compositions) Act, 1882, was passed. It is true that it is a remarkable piece of drafting when looked into; but it recites that it was expedient to amend the law relating to copyright in musical compositions, and to protect the public from vexatious proceedings for the recovery of penalties for the unauthorized performance of the same, and it, amongst other things, enacts, in the case of a musical composition, in s. 2, that "if the owner of the right of public representation or performance shall desire to retain the same, he shall, before any such publication of any copy of such musical composition, give to the owner of the copyright therein notice in writing requiring him to print upon every copy of such musical composition a notice to the effect that the right of public representation or performance is reserved"; and by s. 3 a penalty is imposed upon the owner of the copyright if he does not obey and print legibly and conspicuously upon every copy that the right of public representation or performance is reserved. The practice this Act was passed to put a stop to was this, and it had become notorious.

Certain blackmailers (clients as well as solicitors) were repeatedly in our courts with actions, for penalties and double costs, against performers who had no idea that what they were doing was an infringement of any one's copyright. The modus operandi was this: A person with a copyright was found. That person and a solicitor then waited until they had marked down a sufficient number of singings of a song by some innocent performer, and they then commenced and prosecuted their action against him or her as the case might be. The defendant, though absolutely unconscious of having done any wrong, was inevitably condemned, if proof of his or her having sung the song was forthcoming, in penalties and double costs, without a possibility of escaping a hostile verdict with its attendant consequences.

To meet this grave oppression—for it was nothing less—this Act, as its preamble recites, was passed. It will be seen that this Act does not enact what is to happen if the owner does not have printed upon every copy of a musical composition a notice that the right of public representation is reserved; and the question arises, bearing in mind the object with which the Act was unquestionably passed. What is the meaning of the words, "If the owner of the right of public representation or performance (of any musical composition) shall desire to retain the same he shall . . . . print upon every copy of such musical composition a notice to the effect that the right of public representation or performance is reserved"? Do they mean that he shall retain the right and be able to sue whether he has the notice printed or not? Or do they mean that he shall only retain the right and be able to sue if he carries out the enactment and prints and gives notice to the world of the reservation? The latter, in my judgment, is the true reading of this enactment; and if it were construed otherwise as regards this most important matter, it might just as well never have been placed on the statute book.

But it is said by the plaintiff that this song "Daisy Bell" is, besides being a musical composition, to which the Act of 1882 applies (and this cannot be denied), a dramatic piece, and that being a dramatic piece she is entitled to the penalties, damages, and costs recoverable under the Dramatic Copyright Act, 1833, irrespective of the provisions of the Act of 1882. I do not think this point is tenable. Why is it said that this song is to be held to be a dramatic piece, for primâ facie it is nothing of the sort? It is said that by the interpretation section of the Copyright Act, 1842, it is enacted that the words "dramatic piece" shall be construed to mean and include "every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment," and that this song when sung comes within the words "other scenic, musical, or dramatic entertainment." If this be so, every song must be held to be a dramatic piece, which is absurd. The words "other scenic, musical, or dramatic entertainment" appear to apply to the whole concert or performance, and not to single detached pieces sung therein; and this was the view

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of Brett M.R. in *Wall* v. *Taylor* (1), where that learned judge said the clause was not applicable to each particular composition, but to the whole concert.

Cases were cited to shew that certain songs had been held to be dramatic pieces. The first of these was the case of *Russell* v. *Smith* (2), where in the year 1848 Lord Denman and the Queen's Bench held that a song called the "Ship on Fire," although sung by a performer in plain clothes, at a piano and without any scenery, was a dramatic piece—the ratio decidendi being that as the song moved terror and pity and sympathy by presenting danger, and despair, and joy, and maternal and conjugal affection, and would produce the emotions which are the purpose of the regular drama it was therefore a dramatic piece.

Then the case of *Clark* v. *Bishop* (3) was cited, where a song called "Come to Peckham Rye" was held to be a dramatic piece, the plaintiff, as Kelly C.B. said, "By his powers of singing, acting, and characterization had made the song a thing of value, not as a song merely, but as acted by him in character, and so a dramatic piece." And, lastly, the case of *Roberts* v. *Bignell* (4), in which a song "Oh, Jenny dear!" was held by Day and Wills JJ. to be a dramatic piece, "presented as it was in the particular instance."

It is not necessary to determine whether each of these cases was rightly decided, or whether the reasons given in each for holding the song to be a dramatic piece are satisfactory. Every case must depend upon its own attendant circumstances. In each case it is a question of fact. I think that to constitute a song a dramatic piece it must be such a song as for its proper representation, acting, and possibly scenery, formed a necessary ingredient, and that if neither of these be a requisite to the efficient representation of the song, it is not a dramatic piece.

It is an entire misnomer to call a mere common, ordinary music-hall song, which required neither acting nor scenery for its production, a dramatic piece, for it is in truth nothing of the kind.

In my judgment, as a matter of fact, this song "Daisy Bell"

(1) 11 Q. B. D. 102, at p. 109.
(2) 12 Q. B. 217.
(3) 25 L. T. (N.S.) 908.
(4) 3 Times L. R. 552.

is not a dramatic piece; if it were, every boy in the street who sang it would be liable to be proceeded against for having performed a dramatic piece without the written consent of the author, which is wholly untenable.

No case was made as to the character of the entertainment at the Blackpool Winter Gardens, at which "Daisy Bell" was sung; the point made before us was that the Court was bound to hold that if a person sang "Daisy Bell," no matter how or where, he was liable to penalties, damages, and double costs, because he had performed a dramatic piece. This is not so, and cannot be so.

In my judgment, the plaintiff's case fails upon both of the grounds above mentioned, and this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *C. J. Smith & Gofton.*

Solicitor for defendants: *M. H. Hudson, for W., A. & R. Ascroft, Blackpool.*

A. M.

[IN THE COURT OF APPEAL.]

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THE METROPOLITAN DISTRICT RAILWAY COMPANY, APPELLANTS; THE VESTRY OF THE PARISH OF FULHAM, RESPONDENTS.

Metropolis—Management Acts—New Street—Paving Expenses—Apportionment—Mode of Apportionment among Landowners—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

In making, under s. 77 of the Metropolis Management Amendment Act, 1862, an apportionment of the expenses, or estimated expenses, of paving a new street, the local authority is not bound to charge the owners of land abutting on such street rateably inter se, according to frontage or otherwise, and the apportionment cannot, in the absence of mala fides, be questioned.

APPEAL from the judgment of a Divisional Court on a case stated by a metropolitan police magistrate.

The appellants were summoned on the complaint of the clerk to the vestry of the parish of Fulham for non-payment of a sum

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charged on them as owners of certain land abutting on a new street in respect of paving work to be carried out under the provisions of the Metropolis Management Acts.

At the hearing it was proved that certain persons were charged as the owners of land abutting on the new street at amounts representing two-thirds of the estimated expense of paving the footpath and one-half of the carriage-way opposite to and adjoining their respective land; that this charge was made pursuant to a resolution of the respondents that it was just and expedient to make it; and that the appellants were charged as owners of land abutting on the street at an amount representing the full estimated expenses of paving the footpath and one-half of the carriage-way opposite to and adjoining their land.

The appellants objected that the apportionment was bad, but the magistrate made an order for the recovery of the amount; and an appeal against this order was dismissed by the Divisional Court (Grantham and Wright JJ.).

The appellants appealed against the decision of the Divisional Court.

1895. July 17. *Courthope-Munroe*, for the appellants. Under s. 77 of the Metropolis Management Amendment Act, 1862, the local authority may, in apportioning the expenses of a new street, charge the owners of land in a less proportion than the owners of houses. This provision is meaningless if the local authority has the absolute discretion now claimed for it. It might happen under such an apportionment as the present that, after it had been resolved to charge landowners less than houseowners, by the unequal apportionment among the former class one of them might, in fact, be charged at a higher rate than a houseowner. The meaning of the statute is that when the proportion between the two classes of owners is fixed, the persons in each class shall be charged rateably. The decision in *Stotesbury* v. *Vestry of St. Giles* (1) is opposed to this view; but leave to appeal was refused in that case, which, it is submitted, was wrongly decided. If the local authority has the power now claimed, the provisions of the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66),

(1) 59 L. T. (N.S.) 473.

s. 3, as to the fixing of the amount payable by railway companies whose lines adjoin the street, were not necessary. [He cited also *Reg.* v. *Marsham* (1); *Stroud* v. *Wandsworth District Board of Works* (2); and *Whitchurch* v. *Fulham Board of Works.* (3)]

Channell, Q.C., and *R. Cunningham Glen*, for the respondents. There is nothing in the Act to restrict the absolute discretion of the local authority in apportioning such expenses, as is pointed out in *Stotesbury* v. *Vestry of St. Giles.* (4) It must have been intended to leave the apportionment of the expenses to the local authority, because of the impossibility of laying down a rule that would work fairly in all cases. The principle on which such expenses are apportioned cannot be questioned: *Nesbitt* v. *Greenwich Board of Works* (5); *Davis* v. *Board of Works for Greenwich District.* (6)

Courthope-Munroe, in reply.

Cur. adv. vult.

July 30. KAY L.J. read the following judgment:—Before the passing of the Metropolis Management Amendment Act, 1862, the local authority entrusted by the Metropolis Management Act, 1855, with the duty of paving a new street and recovering the expenses from the owners of the houses forming such street had not the power to charge the owners of land abutting on the street nor any express power of apportioning the expenses. The object of s. 77 of the first-mentioned Act was to supply these deficiencies in the power of the local authority. The question in this case is whether, when an apportionment has been made in which some owners of land have been charged with a larger proportion of the expenses than others, the magistrate or the High Court in the absence of mala fides had any right to interfere. In other words, does the Act impose an obligation upon the local authority to make the apportionment rateably or upon any other principle? At once the question arises, what is meant by rateably or principle? Is the apportionment to be according to length of frontage value

(1) [1892] 1 Q. B. 371.
(2) [1894] 2 Q. B. 1.
(3) L. R. 1 Q. B. 233.
(4) 59 L. T. (N.S.) 473.
(5) L. R. 10 Q. B. 465.
(6) Ante, p. 219.

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of land, or what is to be the basis of it? Length of frontage can hardly be in all cases the basis. One owner might have land only a few yards deep on which no valuable building could ever be erected. The next might with the same frontage have a considerable depth of land which might be available for the erection of large buildings and might be of much greater value. I should expect that the legislature would leave a large discretion in the local authority to consider all the circumstances of each case, and to make what would be in their opinion a fair apportionment having regard to all such considerations.

The appellants are owners of land adjoining a new street in the parish of Fulham. They complain that in the apportionment of the expenses of paving that street other owners of land abutting upon the street have been charged only two-thirds of the estimated expense of paving the footpath and half the carriage-way opposite their respective pieces of land, whereas the appellants have been charged with the full cost of the paving opposite their land.

Sect. 77 of the Act of 1862 provides, first, that the owners of land abutting upon a new street "shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein." It is not said whether the contribution is to be according to length of frontage, value of land, or what is to be the ratio. The next words do create some difficulty—"provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do," and any such costs or expenses are to be apportioned by the vestry or board. The proviso seems to imply that the vestry could not have charged the owners of land in a less proportion than the owners of houses without that express provision. In other words, that the statute means that owners of houses and land must primâ facie be charged rateably, but, as between land and houses, land may be charged in a less proportion than houses. Therefore, it is argued, that as between owners of houses and between owners of land the charge must be rateable, and though the one set of owners may be charged in a less proportion than the other set, the charge upon each set

must be rateable inter se. But the difficulty still remains, what does "rateable" mean? The word is not used in the Act, but if implied, it must be intended that the local authority is not to divide the charge according to length of frontage only. No express principle of division is laid down. It seems to me that this is intentionally avoided for the very purpose of giving the local authority a large discretion.

In *Stroud* v. *Wandsworth District Board of Works* (1) the Court of Appeal had to consider the third section of the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), which empowered the local authority from time to time to execute "any necessary works of repair" upon a carriage road; and, upon a consideration of the scheme and objects of these Acts, the Court came to the conclusion that, although it was not expressed in distinct words, the necessary implication was that the question whether the repair was necessary or not was left to the discretion of the local authority, and that the magistrate or Court could not interfere.

In *Stotesbury* v. *Vestry of St. Giles* (2) the same question that arises in the case before us came before a Divisional Court. The difficulty upon the words of s. 77 of the Act of 1862 to which I have referred does not seem to have impressed the Divisional Court, though it is noticed in the judgment of one of the learned judges. They held that a bonâ fide apportionment among different owners of land could not be interfered with by the magistrate.

In my opinion, a large discretion as to apportionment is intentionally by the statute vested in the local authority; and so long as it is exercised bonâ fide, as in this case, the magistrate or Court has no jurisdiction to interfere.

A. L. SMITH L.J. read the following judgment:—The question in this case depends upon what is the true reading of s. 77 of the Metropolis Management Amendment Act, 1862, and is, whether, when a local authority has paved, or is about to pave, a new street within the metropolis, that authority has a discretion as to how it will apportion the expenses of so doing between the

(1) [1894] 2 Q. B. 1. (2) 59 L. T. (N.S.) 473.

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owners of land abutting thereon, or whether it is bound to apportion the expenses equally between each owner of land, either as regards frontage or rateable value, or on some other defined principle, wholly irrespective of the varying amenities the different plots of land may possess, and the different advantages they may derive from the paving of a new street.

I agree that an apportionment made by a local authority is unimpeachable upon appeal in a court of law (*Nesbitt* v. *Greenwich Board of Works*) (1), unless that authority has exceeded its jurisdiction in doing what it has done: *Reg.* v. *Marsham.* (2)

Unless, therefore, s. 77 enacts that the local authority shall have no discretion as to how it shall apportion the expenses of paving a new street between the abutting landowners, then the apportionment in this case must stand, for the local authority has acted within its jurisdiction in apportioning as it has done the expenses of paving between different landowners.

In the year 1855 it was enacted by the Metropolis Management Act, 1855, that the owners of houses forming a new street should on demand pay to the local authority the estimated expenses of paving such street. This section in no way directed in what manner the expenses were to be borne by the different house-owners, nor did it provide for any apportionment being made by the local authority between them.

So matters rested till the year 1862, when the Act of 1855 was amended by the Metropolis Management Amendment Act of that year. By s. 77 of this Act owners of lands abutting upon a new street were placed under contribution towards these paving expenses as owners of houses had theretofore been; and the section enacts that where any vestry or district board, under the powers of the Act of 1855, had paved or were about to pave any new street, the owners of the land abutting upon such street should be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein; provided that it should be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and convenient so to do; and any such expenses should be apportioned by the vestry

(1) L. R. 10 Q. B. 465. (2) [1892] 1 Q. B. 371.

or district board, who were empowered to recover the same from the owners, or at their discretion to accept payment of the amount apportioned in respect of each house or premises by instalments.

It is clear that this apportionment of the expenses is to be made between the owners of houses and of lands abutting upon the new street, and it will be noticed that the section in no way enacts how this apportionment is to be made—whether according to frontage, or to rateable value, or to any defined principle. This is left to the discretion of the local authority.

It is not suggested in this case that the local authority, in the apportionment which they have made, have charged the owners of land more than the owners of houses; but what the authority have done and what is complained of by the appellants who are landowners is, that they have not apportioned the expenses equally between each landowner.

To test the point taken, suppose the case in which there is no landowner, and nothing but houseowners in a new street. Is there anything in this section, which was passed to bring landowners under contribution, and to give the right of apportionment to the local authority, to compel that authority to apportion the same amount between one houseowner in a street, who has, say, a house with a twenty-foot frontage and a depth of eighteen feet, and the next houseowner, who has a house with a like frontage and treble or quadruple its depth? It certainly was not so enacted by the Act of 1855, and I cannot find it in the Act of 1862, and, indeed, the case *London School Board* v. *St. Mary, Islington* (1) would tend to shew that there is no such restriction. It is true that the point now taken was not argued, though it stood out clearly upon the case. If the local authority have a discretion as to how to apportion the expenses of paving between the different houseowners in a new street, it seems to me that they have a like discretion as regards the different landowners therein.

It was said that the words in s. 77, which make it lawful for the local authority to charge owners of land a less proportion than owners of houses, shew that this is the only inequality

(1) 1 Q. B. D. 65.

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tolerated by the section, and it is upon this that the appellants rest their case. If this be the meaning of the legislature, in my judgment it would not have been left in this ambiguous manner, but there would be found some provision that the local authority were to apportion the expenses either upon frontage (as in s. 150 of the Public Health Act, 1875), or upon rateable value, or upon some other principle of equality; but instead of this we find that the apportionment is left wholly to the vestry to decide, without fetter or restriction, except these words have the effect contended for.

In my judgment this is not the true interpretation of these words, which were inserted, not for the purpose of shewing how an apportionment upon owners of houses was to be made—for they have no relation thereto—but to make it clear that land-owners, when brought under contribution, might be charged less than owners of houses as regards paving expenses, if the local authority thought fit, and the discretion which is otherwise given to the local authority by the rest of the section is not taken away by these words.

For these reasons, as well as those given in the judgments of my Brothers Wills and Grantham in the case of *Stotesbury* v. *Vestry of St. Giles* (1) in the year 1888, to review which the present appeal is brought, I am of opinion that it fails; that the local authority have acted within the jurisdiction given them, and that this appeal must, therefore, be dismissed with costs.

LORD ESHER M.R. I am entirely of the same opinion.

Appeal dismissed.

Solicitors for appellants: *Baxter & Co.*

Solicitor for respondents: *Thomas Blanco White.*

(1) 59 L. T. (N.S.) 473.

A. M.

PEACE AND OTHERS *v.* BROOKES.

1895
May 29.

Bill of Sale—Validity—Introduction of Terms not for the Maintenance or Defeasance of the Security—Attestation—Agent of Grantee—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9, 10—*Form in Schedule.*

A bill of sale of personal chattels was given to secure the repayment of money advanced by several business firms who were creditors of the grantor, in order to enable him to pay a composition to them and to others of his creditors. It contained stipulations that the grantor, a trader, should not during the existence of the security obtain credit to the extent of 10*l.* without the consent of one of the firms parties thereto, but this clause was not to apply to purchases of goods from any of those firms; that the grantor would give them the greater portion of his business, and that he would keep proper books of account of his business, and permit any of the firms or their agent to inspect the same:—

Held, by Hawkins J., that the insertion of those stipulations rendered the bill of sale void, under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not in accordance with the form in the schedule.

The sole attesting witness of the bill of sale was the agent and manager of one of the firms who were grantees. He had conducted the negotiations with respect to the giving of the bill of sale and the payment of the composition, and he had to see that such composition was paid to the creditors other than the grantees.

Per Hawkins J.: The bill of sale was duly attested, because the attesting witness was not a "party thereto" within the meaning of s. 10 of the Act of 1882.

THIS was an interpleader issue, tried before Hawkins J. without a jury at Manchester Assizes in May, 1895, to try the right to certain goods taken in execution as between the plaintiffs in the issue, who were claimants under a bill of sale, and the defendant, the execution creditor.

The facts are fully stated in the judgment of the learned judge.

A. P. Thomas, for the claimants.

Woodburne, for the execution creditor.

Cur. adv. vult.

1895. May 29. HAWKINS J. delivered the following written judgment:—At the close of the year 1894 one J. MacDougal Smith, a

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varnish manufacturer, agreed with the claimants, merchants in Liverpool, to whom he was indebted, and with sundry other creditors, to pay them a composition on their debts respectively; and, in order to enable him to pay such creditors other than the claimants the amount of their composition, he requested the claimants to make him a loan of 150*l.*, which they consented to do. To secure the repayment of such loan, and also to secure the composition to which the claimants were entitled, MacDougal Smith, on December 4 last, executed a bill of sale to the claimants of the chattels named in the schedule thereto, and such bill of sale was duly registered on December 11. One Brookes, a creditor of MacDougal Smith who had not agreed to accept a composition, on April 4 in this year, obtained judgment, and issued a fieri facias for the amount of his debt and costs; and execution was levied by the sheriff of Lancashire upon the goods in question. The claimants dispute the right of the sheriff so to levy. Hence this interpleader issue.

The execution creditor alleges that the bill of sale is void—first, because it is not properly attested under s. 10 of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43); secondly, because the consideration for it is not truly stated and set forth as required by s. 8; thirdly, because it is not in accordance with the form in the schedule to the Act as prescribed by s. 9.

As to the first and second objections, the facts are: The bill of sale is attested by Robert Leck, a chartered accountant at Liverpool, who describes himself as the manager for Peace & Co., oil merchants of the same place, one of the claimants. The negotiations for the composition, and for the giving by MacDougal Smith of the bill of sale, were conducted by Leck, and he had to see to the payment of the composition to the creditors other than the claimants; and, for the purpose of enabling him so to do, an account was opened with the Bank of Liverpool, Limited, in the joint names of MacDougal Smith and himself. The 150*l.* was advanced by three cheques—of Peace & Co. for 100*l.*, of Chrisman & Co. for 25*l.*, and of Turnbull & Co. for 25*l.* Each was drawn payable to the order of MacDougal Smith and R. Leck. These cheques, duly indorsed, were paid into the

bank by Leek half-an-hour or more before the execution of the bill of sale. Leek stated that he acted as agent for Peace & Co. in regard to the bill of sale, and that he was sole attesting witness as a chartered accountant. There was no suggestion of any want of bona fides.

As to the first objection: By s. 10, sub-s. 1, of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), it was required that the execution of every bill of sale should be attested by a solicitor of the Supreme Court, and the attestation should state that before execution the effect of the bill of sale had been explained to the grantor by such solicitor. By s. 10 of the Act of 1882 those provisions were repealed, and in lieu thereof it was provided that "the execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto." There is no pretence for saying that Leek was a party to the bill of sale according to the ordinary understanding of that expression; and I see no reason for interpreting it in any other sense. The object of the legislature in dispensing with the formalities required by the Act of 1878 was to simplify the process to be observed in the execution of a bill of sale, and to make the attestation by any credible witness, not being a party, sufficient. The agent of a party to an instrument is not of necessity a party to it himself. If the legislature had it in contemplation that an agent should be treated as that which he is not, I think it would have used words to express such intention. There is no authority to support the objection, and such as can be said to throw any light upon it is against it. In *Penwarden* v. *Roberts* (1) Field and Bowen JJ. upheld a bill of sale attested by the solicitor of the grantee; and Cotton L.J. in *Hill* v. *Kirkwood* (2), cited in the last-mentioned case, expressed the same view. In *Seal* v. *Claridge* (3) the attesting solicitor was himself the grantee, an actual party to the deed, and on that ground the bill of sale was declared to be invalid. The first objection, therefore, must be overruled.

As to the second objection, I think there is no foundation for

(1) 9 Q. B. D. 137. (2) 28 W. R. 358; 42 L. T. 105.
(3) 7 Q. B. D. 516.

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it. The consideration said not to be truly stated is that part of it which relates to the 150*l.* advance. As a matter of fact, it was advanced to MacDougal Smith, not to him and Leck. It was money lent by the claimants to MacDougal Smith, and he alone could have been sued for it as money lent and advanced to him. It is true the advance was made by the three cheques payable to the joint order of MacDougal Smith and Leck, and those charges were paid into the joint account. But that was only for the purpose of having it distributed among the persons whose compositions were to be satisfied out of it; the advance was nothing more or less than an advance to MacDougal Smith for the purpose correctly stated in the bill of sale. Leck by the consent of all parties acted as agent for each, and the collateral arrangement for having a joint account in his name and that of the grantor, for the purpose of facilitating the disposal of the money when advanced, does not alter the character of the consideration, which consisted simply of the composition on the other debts already due and the new advances.

As to the third objection: By s. 9 of the Act of 1882 it is enacted that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." It is said that the bill of sale in this case is not in accordance with the form in the schedule by reason of the introduction of a stipulation and agreement, "that during the course of the trading of the said J. MacDougal Smith (the grantor), he shall not, during the existence of this security, obtain credit to the extent of 10*l.* without the consent of one of the firms parties hereto (but this clause shall not apply to his dealings or transactions for the purchase of goods from the said firms, and the said J. MacDougal Smith binds himself to give the said firms the greater portion of his business); and the said J. MacDougal Smith shall keep proper books of account of his said business, and shall permit the said parties hereto, or any of them, or any authorized agent of them or any of them, to enter the premises of the said J. MacDougal Smith, and inspect the same books at all reasonable times during the existence of this security."

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I am at a loss to see how this agreement can be said to be terms agreed to "for the maintenance or defeasance of the security." The earlier portion of it appears to be pointed to the obtaining by the grantees of the bill of sale of a monopoly of that part of the grantor's custom to which it is directed, and the latter part to enabling them to have the means of ascertaining whether the earlier part is performed. I am therefore of opinion that the bill of sale is not in accordance with the form, and is for that reason void. I do not feel it necessary to discuss the cases cited to me at the trial. It is in vain to search among the numerous cases decided upon s. 9 for one exactly similar to the present. The principles by which I have been guided are fully expressed in *Thomas* v. *Kelly* (1), *Melville* v. *Stringer* (2), and by the Divisional Court in *Lyon* v. *Morris*. (3)

Judgment for the execution creditor.

Solicitors for claimants: *C. H. Waugh, for Greyson & Birbeck Wilson, Liverpool.*

Solicitors for execution creditor: *Percy Dawson, for William Duckworth, Bury.*

(1) 13 App. Cas. 506. (2) 13 Q. B. D. 392.
(3) 19 Q. B. D. 139.

W. A.

1895
July 29.

THE QUEEN *v.* THE INCORPORATED LAW SOCIETY.

Solicitor—Misconduct—Committee of Incorporated Law Society—Discretion—Affidavit disclosing no primâ facie Case against Solicitor—Solicitors Act, 1888 (51 & 52 *Vict. c.* 65), *ss.* 13, 19.

Upon an application made under s. 13 of the Solicitors Act, 1888, to the committee of the Incorporated Law Society requiring them to call upon a solicitor to answer allegations of misconduct made in the applicant's affidavit, the committee have a discretion not to proceed further in the matter of the application, if they come to the conclusion that the affidavit discloses no case which the solicitor ought to be called upon to answer.

The Court, in the exercise of its discretion, may refuse to grant a mandamus to compel the committee to hold a further inquiry into the alleged misconduct of a solicitor, because by virtue of ss. 13 and 19 of the Solicitors Act, 1888, the applicant has the alternative remedy of bringing such alleged misconduct directly before the Court itself.

RULE for a mandamus to compel the committee of the Incorporated Law Society to hear an application, and report thereon to the Court, under s. 13 of the Solicitors Act, 1888. (1)

(1) The Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13: "An application to strike the name of a solicitor off the roll of solicitors (whether at the instance of the solicitor himself or of any other person), or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and shall be heard by the committee in accordance with rules to be made under the authority of this Act.

"The committee, after hearing the case, shall embody their finding in the form of a report to the High Court of Justice, except where the application is made at the instance of the solicitor himself, in which case the report shall be made to the Master of the Rolls, who shall make such order thereon as he shall think fit.

"If the committee are of opinion that there is no primâ facie case of misconduct against the solicitor, the society need not take any further proceedings; but if the committee are of opinion that there is a primâ facie case, it shall be the duty of the society to bring the report of the committee before the Court.

"The report shall have the same effect, and shall be treated by the Court in the same manner, as a report of a master of the court; and the Court may make such order thereon as to the Court may seem fit.

"Provided that any person who, but for this Act, would have been entitled to apply to the Court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply although the committee is of opinion that there is no primâ facie case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the Court."

An application was made to the committee to require a firm of solicitors to answer certain allegations of misconduct contained in an affidavit. The committee, having considered the application and the affidavit, came to the conclusion that the affidavit did not disclose a case in which they could properly order an inquiry under the above Act, and they wrote to the applicant informing him that they had come to that conclusion, and declining to require the solicitors to answer the allegations in the affidavit, or to hold any further inquiry. This rule was thereupon obtained by the applicant.

Sir E. Clarke, Q.C. (*Holliams* with him), for the committee, and *Finlay, Q.C.* (*Leveit, Q.C.*, and *A. T. Lawrence* with him), for the solicitors, shewed cause against the rule. The committee had a discretion under the Solicitors Act, 1888, to take the course which they have taken. If they have not such a discretion, solicitors would be compelled in all cases to appear, with their counsel and witnesses, before the committee, upon an affidavit which disclosed no primâ facie ground of complaint. The legislature did not intend that the machinery of the Act should bring about such an oppressive and inconvenient result. The committee have in fact heard and determined the application, and performed their duty under the Act. Their affidavit states that a further inquiry is always ordered unless they are unanimously of opinion that no case is disclosed against the solicitors in the applicant's affidavit, and they have taken the same course as here in many instances without objection. On the affidavits they have rightly exercised their discretion in the present case.

Further, the granting of a mandamus by this Court is discretionary; it will not be granted where the Court can see that the applicant has some other convenient remedy. He has here, because by s. 13 he may apply to the Court although the committee are of opinion that there is no primâ facie case of misconduct against the solicitors.

Willis, Q.C. (*Rose-Innes* with him), for the applicant, supported the rule. It cannot be disputed that serious charges of misconduct by the solicitors are made in the applicant's affidavit. The committee had no discretion to refuse to call upon the

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solicitors to answer those charges; they are bound, under the statute, to summon the solicitors before them, and to hear the case; and until this has been done, they have no power to decide that there is no primâ facie case of misconduct. Before the Act was passed, the Court had to decide whether there was a primâ facie case which should be sent to the master to inquire into and report upon, and the Act did not intend to transfer to the committee any part of the jurisdiction exercised by the Court before a case was sent to the master. They are placed in the position in which the master formerly was, and their only jurisdiction is to hear the case and make a report to the Court. Further matters might be brought forward against the solicitor at the hearing. The whole scope of s. 13 is to impose upon the committee the duty of hearing the case when both parties are present, and of reporting to the Court, unless, after the hearing, they decide that no primâ facie case has been made out. Rules 1, 2, 3, 5, and 8 of the rules made under the Act support this view. (1)

[WRIGHT J. The Court of Appeal, in *In re Weare, In re the*

(1) The Rules of January 31, 1889, made under the authority of the Solicitors Act, 1888, contain the following provisions:—

Part 1, r. 1: "An application to the committee to strike a solicitor off the roll of solicitors, or to require the solicitor to answer allegations contained in an affidavit, must be in writing under the hand of the applicant, and be sent to the registrar, together with an affidavit by the applicant, stating the matters of fact on which he relies in support of his application.

Rule 2: "A copy of the application and of the affidavit, together with notice of the day for hearing the application, must be sent by the registrar to the solicitor at his last known place of abode or business; and notice of the day of hearing must also be given to the applicant."

By rule 3, the applicant and the solicitor respectively are to furnish to the registrar and to each other a list of all documents they respectively propose to put in; and "such list must, unless otherwise ordered by the committee, be furnished by the applicant at least fourteen days before the day of hearing, and by the solicitor within seven days after he has received the list furnished by the applicant."

By rule 5, "At the hearing of the application by the committee, either party may appear in person or by his counsel or solicitor," &c.

By rule 8, "After hearing the case, a report of the finding of the committee thereon shall be drawn up, and be signed by the chairman of the committee, and, except where the application is made at the instance of the solicitor himself, shall be filed at the Central Office of the Supreme Court."

Solicitors Act, 1888 (1), held that, under s. 19 (2), an applicant against a solicitor can come to the Court, though no application has been made to the Committee of the Incorporated Law Society.]

If that be so, a mandamus should be granted in this case, because the committee are assuming jurisdiction, which they say they have exercised in many cases, to decide upon the applicant's affidavit, without hearing the parties and coming to a conclusion upon the evidence whether there is a primâ facie case or not. An important question is, therefore, raised which can only be determined by mandamus.

POLLOCK B. In this case it certainly was proper to grant a rule in order that an important question might be discussed, affecting the new jurisdiction given to the Incorporated Law Society by the Solicitors Act, 1888. In construing that Act the chief and cardinal point to be considered is that the committee of the society are not placed in the position of the Court itself, but are substituted for the master, whose duty before the passing of the Act it was to make a report of the facts in order to assist the Court in coming to a conclusion. It is quite clear that, before the Act was passed, the master had no duty to perform except of a subsidiary character. He had not to decide whether an inquiry was necessary or proper: that was a question for the Court itself. It is quite true that the Act assumes that the application, in the first place, shall be made to the committee, and not to the Court as of old. But that, to my mind, has an important bearing against the present application for a mandamus; because I think the legislature never could have intended that, whereas in times past an inquiry as to the conduct of a solicitor could only be made where the Court had first considered whether there was a primâ facie case against him, now in future under all possible circumstances, except where the application is not made bonâ fide, the committee shall and must

(1) [1893] 2 Q. B. 439.

(2) The Solicitors Act, 1888, s. 19: "The Master of the Rolls, or any judge of the High Court of Justice, may, notwithstanding anything in this Act, exercise any jurisdiction over solicitors which he might have exercised if this Act had not been passed."

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inquire and make a report to the Court, even although they may be of opinion that there is no primâ facie case. That seems to me a strong reason for looking at the Act to see whether it has not provided for a much more rational course by giving a discretion to the committee to say, at any stage of the inquiry, whether they think there is any primâ facie case which ought to be not only dealt with or not dealt with by the Court, but further prosecuted by themselves. In my opinion, the Act is so framed as to give them that discretion. Although the words used in s. 13 are that an application "shall be made to and shall be heard by the committee," you find afterwards these words: "If the committee are of opinion that there is no primâ facie case against the solicitor, the society need not take any further proceedings." I think that provision is intended to include further proceedings at any period when the case is before them. The clause runs on: "But if the committee are of opinion that there is a primâ facie case, it shall be the duty of the society to bring the report of the committee before the Court," and then "the report shall have the same effect, and shall be treated by the Court in the same manner, as the report of a master of the Court"—thus clearly preserving the distinction I have already pointed out as existing under the old practice. Further, there is this proviso: "Any person who but for this Act would have been entitled to apply to the Court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled to apply, although the committee is of opinion that there is no primâ facie case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report before the Court." Mr. Willis dealt with those last words as if the bringing of the report before the Court was to be a condition precedent in all cases. It is clear to me that this portion of the section deals with two sets of things. First, the party aggrieved is entitled to apply, although the committee have exercised their discretion and have said there is no primâ facie case, and therefore have made no report; secondly, if the report is made he is entitled to be heard when the society brings it before the Court. I think there is no great difficulty in giving the Act

that construction, which, to my mind, is not only a reasonable construction in itself, but it is a construction which brings the Act into harmony with the procedure of this Court before it was passed. That, of course, would be sufficient to dispose of this case; but I think it right also to say that I am clearly of opinion that this is a case in which the Court, in the exercise of its discretion, ought not to grant a mandamus. The well-known rule that this Court will not grant a mandamus where there is another equally convenient remedy has been thoroughly established. In *Reg.* v. *Lords Commissioners of the Treasury* (1) Lord Campbell (at p. 361) said that the application for a mandamus in that case ought to be granted, because the right which was sought to be enforced was a legal right; and there was no efficient remedy without the aid of this prerogative writ. In *In re Barlow* (2) Hill J., who was specially conversant with these matters, said: "It is well settled that where there is a remedy equally convenient, beneficial, and effectual, the writ of mandamus will not be granted." Those cases came before Field and Wills JJ. in *Reg.* v. *Registrar of Joint Stock Companies* (3), and were acted upon, with approval, by the Court. The same principle was applied also by the Court of Appeal in *In re Nathan*. (4) That being the state of the decisions, let us see how they apply here. It is a case of all others in which the old jurisdiction of this Court was of a quasi domestic character. It was a jurisdiction whereby this Court maintained its rights over the duties and deficiencies of its own officers, and it was a mere matter of convenience when, by the Act of 1888, the committee was substituted for the master. The same Act of Parliament which makes the substitution provides that any person, notwithstanding anything that is done by the committee, may still come to this Court. That is also further dealt with by s. 19. It cannot, I think, be said that there is not another mode of proceeding; and I think that that mode of proceeding is not only equally convenient, beneficial, and effectual, but more convenient, more beneficial, and more effectual than a writ of mandamus, which is open to a great many very serious objections. It seems to me on both grounds

(1) 16 Q. B. 357.
(2) 30 L. J. (Q.B.) 271.
(3) 21 Q. B. D. 131.
(4) 12 Q. B. D. 461.

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this application must fail, and the rule ought to be discharged, with costs.

WRIGHT J. I am of the same opinion. I think there are three reasons why this application should fail. First, it appears to me that, on the true construction of the Act, the effect of it is that applications, instead of being made as they used to be made to the Court, shall now be made to the committee. The Court in its discretion used to refuse to grant a rule at all in a case which did not demand an inquiry. I think it follows that the committee have, to some extent at any rate, the same jurisdiction—namely, to refuse to entertain the matter unless some reasonable ground is brought before them. Now, where the matters alleged, if they were proved, would not amount to professional misconduct, it seems to me clear that the committee not only may, but ought to refuse to put the parties to the inconvenience and trouble of an inquiry into the matter. If the duty of the committee is not absolute, as I think it is not absolute, under the Act, then this Court, in the exercise of its discretion, would be very slow to interfere with the decision of a body of this kind, specially selected by parliament for dealing with this particular subject. The next reason is that, even if that be not so, I think they are very much in the position of a magistrate to whom an application is made to grant a warrant. The late Lord Chief Justice said that they were in the position of a grand jury, who might throw out bills if there was not a primâ facie case made. I prefer to take the analogy of a magistrate. This Court will not issue an order to a magistrate to grant a summons against a person alleged to have committed an offence unless the magistrate has declined jurisdiction on grounds he ought not to have taken into consideration. So, here, I think we ought not to order the committee to proceed unless they clearly appear to have acted on some ground on which they could not refuse judicially to entertain the application. Thirdly, I agree that we ought to be influenced by the consideration that, according to the decision of the Court of Appeal in *In re Weare, In re the Solicitors Act*, 1888 (1), the Court of Appeal took the

(1) [1893] 2 Q. B. 439.

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THE QUEEN v. INCORPORATED LAW SOCIETY.

Wright J.

view that s. 19 of the Act in question has preserved the jurisdiction of the High Court to act on its own motion if it thinks fit; and that, to my mind, is a more convenient course than issuing a mandamus, and having the matter twice argued here, and before the committee afterwards. I specially wish to say that in my judgment there might be cases in which this Court would have power to order, and ought to order, the committee to proceed to hear a case: because they are in a better position in many respects for dealing with some of these cases than a master could be, or any other body or person.

Rule discharged.

Solicitor for committee of the Incorporated Law Society: *S. P. B. Bucknill.*

Solicitor for applicant: *R. Chapman.*

W. A.

THE BRITISH INSULATED WIRE COMPANY, LIMITED *v.* THE PRESCOT URBAN DISTRICT COUNCIL.

1895

July 29.

Local Government—Local Authority—Contract—Validity—Specifying Penalty—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 174, *sub-s.* 2.

The Public Health Act, 1875, s. 174, sub-s. 2, provides, with respect to contracts made by an urban authority under the Act, that every contract whereof the value or amount exceeds 50*l.* "shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed":—

Held, that this enactment was obligatory, and not directory only; so that a contract which did not specify any pecuniary penalty could not be enforced against the urban authority.

SPECIAL CASE stated in an action pursuant to the order of Day J.

The action was brought to recover against the defendants, an urban authority constituted under the Public Health Act, 1875, quarterly and other payments alleged to be due under a contract between the plaintiffs and the defendants.

The following material facts were stated in the case: In November, 1892, the plaintiffs and the defendants entered into

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a contract in writing, duly sealed with the seal of the defendants, whereby the plaintiffs agreed to efficiently light, by means of electricity, the streets within the defendants' district for a period of five years for the annual sum of 350*l.*, to be paid by the defendants quarterly in each year.

The contract contained stipulations with respect to the materials to be supplied, the things to be done, the prices to be paid, &c.; and there was a clause providing that any disputes or differences arising between the parties touching or concerning the works agreed to be done, and the maintenance and supply of electric light, or touching or concerning any other matter or thing whatsoever relating to the said work and maintenance, or to the construction of the contract, or any rights and liabilities thereunder, should be determined by arbitration under the Arbitration Act, 1889, or any statutory modification thereof.

The contract contained no clause specifying any pecuniary penalty to be paid in case its terms were not duly performed. (1)

The plaintiffs had duly performed the contract on their part, and would be entitled to the sums claimed in the action, if the contract was valid and binding upon, and enforceable against, the defendants.

The question for the opinion of the Court was, whether the contract was void, or not binding upon or enforceable against the defendants, by reason that it did not specify some pecuniary penalty to be paid in case the terms thereof were not duly performed.

Arkle (*Lawson Walton, Q.C.*, with him), for the plaintiffs. The enactment in s. 174, sub-s. 2, of the Public Health Act, 1875, is directory only. Great inconvenience would result from holding

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174: "With respect to contracts made by an urban authority under this Act the following regulations shall be observed:—

"(1.) Every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority;

"(2.) Every such contract shall specify the work materials matters or things to be furnished had or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed."

that it was imperative, so as to compel the insertion, in all these contracts with urban authorities, of a clause specifying a pecuniary penalty for breach of any term. In many cases the penalty could not be enforced. It could not here. If there were a trifling breach—such as one of the electric lamps failing for a short time—no Court would enforce the same penalty as attached to a serious breach of the contract. The object of the legislature was to provide some measure of liquidated damages. That is done by the arbitration clause in this contract. In *Melliss* v. *Shirley Local Board* (1) this point arose, but was not decided by the Court of Appeal. In *Young* v. *Mayor, &c., of Royal Leamington Spa* (2) the House of Lords held that the enactment in sub-s. 1, which requires every contract exceeding 50*l.* in value to be sealed with the seal of the urban authority, was imperative and not directory; but Lord Blackburn (at p. 524) seems to have treated the question as open and arguable with respect to sub-s. 2.

[WRIGHT J. Lord Bramwell, however (at p. 527), treats sub-s. 2 as being in the same position as sub-s. 1.]

As pointed out in the judgments in that case, sub-ss. 3 and 4 are clearly only directory, and sub-s. 2 ought to be construed as having the same effect. In *Nowell* v. *Mayor, &c., of Worcester* (3) the proviso in s. 85 of the Public Health Act, 1848 (11 & 12 Vict. c. 63)—namely, that before making a contract exceeding 10*l.* the local board shall obtain an estimate in writing of the probable expense, and a report as to the most advantageous way of contracting—was held to be directory only.

[*Attorney-General* v. *Gaskill* (4) was also referred to in the course of the argument.]

Danckwerts, for the defendants, was not required to argue.

POLLOCK B. I should have thought, apart from authority, that the provisions of s. 174, sub-s. 2, of the Public Health Act, 1875, were not directory merely, but essential and obligatory. Sub-s. 2 enacts that "every such contract *shall* specify" the work, &c., and "*shall* specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed." The

(1) 16 Q. B. D. 446.
(2) 8 App. Cas. 517.
(3) 9 Ex. 457; 23 L. J. (Ex.) 139.
(4) 22 Ch. D. 537.

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term is the same as is used in sub-s. 1, which makes it necessary that every such contract "shall be" under seal. I do not see how it can be said that the words "shall specify" in sub-s. 2 are intended to treat the matter as merely voluntary or discretionary. Sub-ss. 3 and 4 do not deal with the form of the contract, but only with certain conditions which precede the contract being entered into; and in the case cited—*Young* v. *Mayor, &c., of Royal Leamington Spa* (1)—a great distinction is certainly drawn between those sub-sections, which are directory only, and sub-ss. 1 and 2. The other authorities are also in favour of the view I take. I am of opinion that our judgment should be for the defendants.

WRIGHT J. I am of the same opinion.

Judgment for the defendants.

Solicitors for plaintiffs: *Norris, Allens & Chapman, for J. Leslie & Co., Liverpool.*

Solicitors for defendants: *Chester, Mayhew, Broome & Griffithes, for Henry Cross, Prescot.*

W. A.

1895

May 21; *July* 31.

ATTORNEY-GENERAL *v.* ELLIS AND OTHERS.

Revenue—Probate Duty—"Voluntary Transfer"—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* (2) (*b*)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-s.* (1).

Two persons purchased stock in their joint names out of money contributed by them in equal proportions on the express agreement that the survivor should be entitled by right of survivorship to the stock so purchased.

On the death of one of the joint purchasers the Crown claimed account stamp duty under s. 38, sub-s. (1) (*b*) of the Customs and Inland Revenue Act, 1881, on so much of the stock as was purchased with money of the deceased:—

Held, that the purchase of so much of the stock as was purchased out of money of the deceased was a "voluntary transfer" of such stock by the deceased to himself and his co-purchaser within the meaning of the

(1) 8 App. Cas. 517.

section, notwithstanding that it was made in consideration of his co-purchaser doing the like, and that the Crown was consequently entitled to the duty claimed.

INFORMATION by the Attorney-General against the executors of Arthur Ellis, deceased, to recover account stamp duty under 44 & 45 Vict. c. 12, s. 38 (1), and 52 & 53 Vict. c. 7, s. 11, in respect of certain railway stocks standing in the joint names of Arthur Ellis and his wife Charlotte Jane Ellis at the time of the death of the said Arthur Ellis.

The facts and arguments sufficiently appear from the judgment of the Court.

Sir R. T. Reid, A.-G., and *Vaughan Hawkins*, for the Crown.
Farwell, Q.C., and *L. H. Jenkins*, for the defendants.

Cur. adv. vult.

July 31. The judgment of the Court (Lord Russell of Killowen C.J. and Charles J.) was read by

LORD RUSSELL of KILLOWEN C.J. This was an information against the executors of Arthur Ellis to recover account stamp duty in respect of certain railway stocks standing at the time of

(1) By the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 1, "Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof."

Sub-s. 2: "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—

"(*b*) Any property which a person dying on or after such day (June 1, 1881) having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person."

By the Customs and Inland Revenue Act, 1889, s. 11: "(1.) Subsection two of section thirty-eight of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—. . . .

"The description of property marked (*b*) shall be construed as if the expression 'to be transferred to or vested in himself and any other person,' included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person."

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Lord Russell C.J.

his death in the joint names of his wife Charlotte Jane Ellis and himself.

No part of these stocks had been bought solely with money belonging to Arthur Ellis. All of them had in fact been bought with moneys contributed in equal shares by him and by his wife out of her separate estate. These investments were made from time to time in pursuance of a verbal arrangement that they should, on the decease of such one of the parties as should first die, belong to the survivor absolutely. Arthur Ellis died on February 11, 1891. By his will he devised and bequeathed his residuary estate for the benefit of his wife during widowhood, and afterwards for his children. The will then declared that his wife and himself had from time to time invested moneys partly belonging to him and partly to her in various railway stocks and shares, which were registered in their joint names, "such investments having been made on the express agreement that the survivor of them should be entitled by right of survivorship to the stocks and shares so bought," and proceeded to direct that the income of the residuary estate should be enjoyed by her on condition of her transferring all such stocks and shares to his executors and trustees, to be by them held on the same trusts as the rest of his residuary estate. In fulfilment of this condition the various stocks and shares were duly transferred into the names of the defendants, the executors and trustees of Arthur Ellis. It was now sought to charge account stamp duty on so much of the stocks and shares as had been bought by Arthur Ellis out of his own moneys. The defendants refused to pay the duty claimed on the ground that the investment of the moneys by Arthur Ellis was made in pursuance of a contract for value and not "voluntarily" within the meaning of the Customs and Inland Revenue Acts, 1881 and 1889, and this is the question to be determined.

By the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 1, it is enacted as follows: "Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof." Sub-s. 2: "The personal or moveable

property to be included in an account shall be property of the following descriptions, viz.: (*b.*) Any property which a person dying on or after such day (June 1, 1881) having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person." By the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11, it is enacted that the description of property marked (*b*) in the Customs and Inland Revenue Act, 1881, s. 38, "shall be construed as if the expression 'to be transferred to or vested in himself and any other person' included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person."

It was contended on behalf of the Crown that the act of Arthur Ellis was "voluntarily" done, inasmuch as it had not been done in pursuance of any obligation previously incurred either by common law, statute, or contract. Had Arthur Ellis acted alone—it was pointed out—there could not have been any doubt that the transfer would have been voluntarily effected; and it was urged that, even under the words of the earlier statute, the circumstance that the wife brought in equivalent sums, could make no difference. She, too, was not acting under any precedent obligation. Further, it was said that the amending statute made the matter perfectly clear: Arthur Ellis had done the very thing contemplated: he had effected a purchase "in concert or by arrangement with" his wife of securities, the beneficial interest in which accrued by survivorship to her on his death, and that it by no means followed that because there might have been consideration between the parties the acts could not properly be considered to have been "voluntarily" done within the meaning of the Act. (See *Crossman* v. *Reg.* (1))

The defendants, on the other hand, contended that "voluntarily" meant "gratuitously" or "without consideration," and that here the transfer was not gratuitous but for valuable consideration.

(1) 18 Q. B. D. 254.

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The funds were contributed in consideration of mutual promises. The husband and wife had contracted with each other for value, and except as in so far as every contract is in one sense voluntary, as being the result of an exercise of will, the act of neither was "voluntarily" done: see *In re New University Club.* (1)

We are, however, of opinion that in the section under consideration the word "voluntarily" is not used in the sense of "without consideration," but in its ordinary sense of "freely, without compulsion," and "not under any obligation": see *Churchwardens of Birmingham* v. *Shaw* (2); *Art Union* v. *Savoy.* (3) We think that this is not only the true construction, but it is that best calculated to carry out the object of the Act, which was to fix with liability to duty "all dispositions" which, while preserving to a man the enjoyment of personal property to the day of his death, make the same property pass on his death to some one else, and so become substitutes for wills: *Attorney-General* v. *Gosling.* (4) It is, moreover, a construction which makes it possible to put a reasonable interpretation on the amending Act, s. 11, relating to property marked (*b*), whereas if "voluntarily" means "without consideration," it is difficult to give effect to the words in the last-mentioned section, "in concert or by arrangement with"—words which would appear to point to the existence of some contractual obligation. Our judgment must therefore be for the Crown.

Judgment for the Crown.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Walker, Son & Field.*

(1) 18 Q. B. D. 720.
(2) 10 Q. B. 868.
(3) [1894] 2 Q. B. 609.
(4) [1892] 1 Q. B. 545, at p. 550.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1895
July 28.

KERSHAW, Appellant; TAYLOR, Respondent.

Metropolis—Management Acts—Sewer—Drain—Liability to Repair—Effect of Builder's Disobeying Order of Sanitary Authority—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

Under the Metropolis Management Act, 1855, the duty of repairing sewers lies on the sanitary authority, that of repairing drains on the owner of the house; and by the same Act a drain, which, without an order of the sanitary authority in that behalf, drains more than one house, is a sewer.

A builder in 1887 built in the metropolis four houses which he, contrary to the directions of the sanitary authority, caused to be drained into one drain. He subsequently sold the houses to different purchasers. In a proceeding to compel the purchaser of the premises, in which the drain which so received the drainage of the four houses was situate, to repair such drain for the purpose of remedying a nuisance caused by its defective condition:—

Held, affirming the judgment of the Divisional Court, that the purchaser was not estopped by the wrongful act of his predecessor in title from alleging that the drain in question was a sewer, and that the duty of repairing it consequently lay not on him but on the sanitary authority.

Appeal from a judgment of a Divisional Court on a case stated by a metropolitan police magistrate, reported ante, p. 208, where the facts are set out.

The builder of certain houses obtained the sanction of the board of works for the district to plans shewing that the drainage of each pair of houses was to be carried by a single drain into the sewer, and he improperly, and without the permission of the board, connected the drainage of two pairs of houses. He subsequently sold the houses to different purchasers without notice that the drainage system was in contravention of the approved plan. The respondent eventually became the owner of one of the houses. The question in the case was whether, under the Metropolis Management Act, 1855, s. 250, the drain from the point where it received drainage other than that from the pair of houses, of which the respondent owned one, was a drain so as to be repairable by the owner, or a sewer so as to be repairable by the district board. The magistrate decided that it was a

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sewer, and an appeal was dismissed by the Divisional Court (Wright and Kennedy JJ.) (1)

The appellant appealed against this judgment.

Channell, Q.C., and *Marwood*, for the appellant.

E. Bray, for the respondent.

LORD ESHER M.R. The magistrate and the Divisional Court have held that this thing about which the dispute was is a sewer, and that there is nothing to prevent the respondent from asserting that it is so. If this is right, it follows that the district board are bound to repair it as a sewer. The builder had authority to make drains by which the sewage of each pair of houses was to be carried in a single drain to the sewer, and this was to be done to the satisfaction of the surveyor. In fact, he made a drain that carried off the sewage of four houses, and by so doing he made a sewer within the definition in s. 250 of the Metropolis Management Act, 1855. The respondent came into possession of one of the houses, and when called on to abate a nuisance he found out what had been done, and pointed out that what he was called on to repair was a sewer. He is not estopped from doing so by any act of his own, or of any one by whose acts he is bound. All we have to do is to answer the question in the case; and the answer is that the drain in question was a sewer from the point where it received the drainage of more than two houses, and was consequently repairable by the district board. The appeal will, therefore, be dismissed.

KAY L.J. The question raised in this case is whether a particular conduit (to use a neutral word) the defect in which caused a nuisance was a drain or a sewer. To ascertain this we must look at s. 250 of the Metropolis Management Act, 1855, which contains definitions of the words "drain" and "sewer." The former is to include any drain of and used for the drainage of one building or draining a group of houses by a combined operation under the order of any vestry or district board. It is admitted that this conduit does not merely drain one building,

(1) Ante, p. 208.

and was not created under the order of a vestry or district board. It is, therefore, not within the definition of a drain; and as the word "sewer" is to mean sewers and drains of every description to which the word "drain" does not apply, it follows that it must be a sewer.

An attempt is made to get behind this conclusion by saying that the houses have been drained without the knowledge of the local authority, who ought therefore to be entitled to say that the drainage is not by a sewer but by a drain. The question however is, rebus sic stantibus, is this a drain or a sewer? And want of knowledge on the part of the local authority is no answer to the assertion of the respondent that he is not liable for anything but a drain. The conversion of what would have been a drain into a sewer was not by any act of the respondent, and there is no estoppel against him.

A. L. SMITH L.J. This case arises on a notice to abate a nuisance caused by a drain of the respondent's. He took steps to comply with the notice, and when he had uncovered the drain for some distance he found a point at which it ceased to be a drain and became a sewer. That it did so cease is plain from the definition of the words "drain" and "sewer." The definition of the word "drain" is inapplicable in this case; and if so the word "sewer" is applicable. Sect. 47 of the Metropolis Management Amendment Act, 1862, which has been referred to, and which relates to the permission required by private parties before they can branch sewers into a main or district sewer, does not in my opinion throw any light on the matter before us. It is suggested that we ought to find some way out of the difficulty which arises from the board being saddled with expense by the wrongful act of the builder. I agree that there is this difficulty, and I wish therefore to confine my judgment to this case and to the facts of this case only.

Appeal dismissed.

Solicitors for appellant: *W. W. Young & Son.*
Solicitors for respondent: *Griffinhoofe & Brewster.*

A. M.

1895
Aug. 2.

STODDART and Others, Appellants *v.* SAGAR, Respondent.
SAGAR, Appellant *v.* STODDART and Others, Respondents.

Gaming — Lottery — Betting — Sale of Chances in Lottery—Place used for Betting—"Coupon Competition"—Gaming Act, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2—4 *Geo.* 4, *c.* 60, *s.* 41—*Betting Acts*, 1853 *and* 1874 (16 *&* 17 *Vict. c.* 119, *ss.* 1, 3, 4, *and* 37 *&* 38 *Vict. c.* 15, *s.* 3, *sub-s.* 3.)

The defendants published a newspaper containing an advertisement of a "Coupon Competition," which was to be carried out by means of coupons, to be filled up by the purchasers of the paper with the names of the horses selected by the purchasers as likely to come in first, second, third, and fourth in a race. For every coupon filled up after the first the purchaser paid a penny, and the defendants promised a prize of 100*l.* for naming the first four horses correctly.

The defendants were prosecuted, under the Acts for the Suppression of Lotteries, for opening and keeping an office to exercise a lottery, for selling tickets and chances in a lottery, and for publishing a proposal or scheme for the sale of tickets and chances in a lottery; also, under the Betting Act, 1853, for opening, keeping, and using an office for the purpose of money being received as the consideration for an undertaking to pay money on events and contingencies relating to horse-races, and for receiving moneys as deposits on bets, on condition of paying 100*l.* on the happening of events and contingencies relating to horse-races; also, under the Betting Act, 1874, for publishing an advertisement inviting all who read it to make bets and wagers on such events and contingencies.

On cases stated by a magistrate:—

Held, that the transaction did not amount to either a lottery or betting, within the meaning of the Acts under which the proceedings were instituted, and the defendants were not liable to be convicted.

Two cases were stated for the opinion of the Court by an alderman of the City of London.

In the first case three informations were preferred by Sagar against Ada Jane Stoddart, Joseph Stoddart, and Frederick Brandon.

1 (42 Geo. 3, c. 119, s. 2). For that Ada Jane Stoddart did, on March 26, 1895, unlawfully and publicly open and keep an office and place at 53, Fleet Street, to exercise, by a certain contrivance and device called a Coupon Competition, a lottery

not authorized by Parliament, and for that Joseph Stoddart and Brandon did unlawfully and knowingly aid, abet, counsel, and procure the commission by Ada Jane Stoddart of the said offence.

2 (4 Geo. 4, c. 60). For that Ada Jane Stoddart did, on March 26, 1895, unlawfully sell certain tickets and chances in a lottery called a Coupon Competition, which lottery, and the sale of which tickets and chances, were not authorized by any Act of Parliament (charging Joseph Stoddart and Brandon with aiding, abetting, &c.).

3 (4 Geo. 4, c. 60, s. 41). For that Brandon did, on March 26, 1895, unlawfully publish a proposal or scheme called a Coupon Competition, for the sale of tickets and chances in a lottery not authorized by any Act of Parliament (charging the Stoddarts with aiding, abetting, &c.).

In the second case five informations were preferred by and against the same parties.

1. (Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 1 and 3). For that Ada Jane Stoddart, being the occupier of an office and place at 53, Fleet Street, did unlawfully open, keep, and use the said office and place for the purpose of money being received on behalf of the occupier, as and for the consideration for an assurance and undertaking to pay thereafter money on events and contingencies relating to horse-races (charging Joseph Stoddart and Brandon with aiding, abetting, &c.).

2 (Same Act). For that Joseph Stoddart and Brandon did unlawfully have the care and management, and did unlawfully conduct, and assist in conducting, the business of the said office and place, which was opened, kept, and used, for the purpose aforesaid (charging Ada Jane Stoddart with aiding, abetting, &c.).

3 (Same Act, ss. 1 and 4). For that Ada Jane Stoddart, being the occupier of the said office and place, then opened, kept, and used for the purpose aforesaid, did unlawfully and knowingly receive certain moneys, as deposits on bets, on condition of paying the sum of 100*l.* in money on the happening of certain events and contingencies relating to horse-races (charging Joseph Stoddart and Brandon with aiding, abetting, &c.).

4 (Same Act, ss. 1 and 3). For that Joseph Stoddart, being

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the owner of the said office and place, did unlawfully, knowingly, and wilfully permit the said office and place to be unlawfully opened, kept, and used, by Ada Jane Stoddart and Brandon, for the purpose of money being received by the occupier of the office and place, as and for the consideration for an assurance and undertaking to pay thereafter money on events and contingencies relating to horse-races (charging Ada Jane Stoddart and Brandon with aiding, abetting, &c.).

5 (Betting Act, 1874 (37 & 38 Vict. c. 15), s. 3, sub-s. 3). For that Brandon, on March 26, 1895, did unlawfully and knowingly publish an advertisement of a competition called a "Coupon Competition," in a newspaper called *Turf Life*, inviting all who read the advertisement to make, and take shares in and in connection with, bets and wagers on such events and contingencies as are mentioned in the Betting Act, 1853 (charging the Stoddarts with aiding, abetting, &c.).

The two cases were heard together.

The following facts were proved.

Ada Jane Stoddart was the occupier of an office at 53, Fleet Street, and the registered proprietor of the newspaper called *Turf Life*. She sold copies of the issue of the newspaper published on March 26, 1895. She opened and kept the office for the purpose of carrying on the business of *Turf Life*, and for the purpose of receiving all remittances relating to the business of the newspaper, including remittances in respect of the "Coupon Competition." She in fact received remittances relating to the copies of the newspaper issued on March 26, 1895, including remittances in respect of the "Coupon Competition" advertised in that number.

Joseph Stoddart was the owner of the office. He permitted the office to be used for the purpose of the circulation of the newspaper, with knowledge of all its contents. He, jointly with Brandon, had the care and management of the business of the newspaper, and assisted in conducting the business, which included the "Coupon Competition" of March 26, 1895.

Brandon was the publisher of the newspaper. He published the copies issued on March 26, 1895, with knowledge of the contents. He, jointly with Joseph Stoddart, had the care and

management of the business of the newspaper, and assisted in conducting the business.

The conditions of the "Coupon Competition" appeared in the newspaper issued on March 26, 1895; so far as material, they were as follows:—

"£100 for placing 1st, 2nd, 3rd, 4th, in the Grand National (run next Friday).

"Note the Conditions.

	First.	Second.	Third.	Fourth.
No. 1 (Free Coupon).				
No. 2 „				

[and so on down to No. 25].

"Name

"Address

Two shillings must be remitted if all the above coupons are used. . . . The No. 1 coupon in the above column can be used free of charge. This coupon can be filled up, cut out, and despatched to us, and will be accepted for competition without any charge or fee being sent with it. If the remaining 24 blank coupons are used, 1*d.* stamp must be sent with each of these coupons so used. Thus if 25 different attempts are made on the above sheet to correctly arrive at the winners, 2*s.* must be remitted. In all cases the coupon marked No. 1 is free. . . . There is no limitation to the number of coupons to be sent in. Predictions can also be made on plain paper on the same terms, but one free coupon at least must accompany same, to shew that the competitor is a subscriber to *Turf Life*."

In the first case (that under the Lottery Acts) the alderman found as a fact that the winning of the prize in the competition would be determined by chance, and not by skill, and was of opinion that the facts stated were sufficient in law to support the offences charged in the three informations under the Lottery Acts, and convicted the defendants.

In the second case (that under the Betting Acts) the alderman was of opinion that the facts stated were not sufficient in law to

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support any of the offences charged under the Betting Acts, 1853 and 1874, and dismissed the five informations.

In both cases the question upon which the opinion of the Court was desired was, whether the alderman came to a correct determination in point of law.

Carson, Q.C. (*Grain* and *L. W. Kershaw* with him), for the appellants in *Stoddart* v. *Sagar*. The facts stated in the case do not shew that there was a lottery, and cannot be held to come within 4 Geo. 4, c. 60, s. 41, which imposes penalties for the sale of tickets or chances in lotteries. In a lottery there is no opportunity for the employment of any skill or judgment; the event depends on pure chance. In selecting winning horses the event depends in a great measure on the exercise of skill, knowledge, and judgment, and therefore this competition cannot be a lottery. That this is so is shewn by the judgment of Stirling J. in *Barclay* v. *Pearson* (1), and by the decision of Day and Lawrance JJ. in *Caminada* v. *Hulton*. (2) The latter case came before the Court on facts very similar to those of the present case, and amounts to a conclusive authority in favour of the present appellants. *Taylor* v. *Smetten* (3) is distinguishable, and is really in the appellants' favour, for what was done there was held to be a lottery expressly on the ground that it was a "distribution of prizes by lot or chance."

R. D. Muir, for the respondent in *Stoddart* v. *Sagar*, and for the appellant in *Sagar* v. *Stoddart*. The facts stated in the first case amount to a lottery. It is not necessary that the event should depend altogether on pure chance; it is a question of degree.

In the second case, the newspaper office was a place kept for betting: it was a mere betting-house; and the case therefore comes within the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1. (4)

(1) [1893] 2 Ch. 154.
(2) 60 L. J. (M.C.) 116.
(3) 11 Q. B. D. 207.
(4) By 16 & 17 Vict. c. 119, s. 1, "No house, office, room, or other place, shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of, such owner, occupier, or keeper, or person using the same, or of any

Caminada v. *Hulton* (1) is distinguishable, because in that case every one dealing with the respondent received something of value, for in any event he got the book: here the transaction was a mere bet: the pence were received as the consideration for a promise to pay money on a contingency of or relating to a horse-race.

In *Carlill* v. *Carbolic Smoke Ball Co.* (2) Hawkins J. said: "It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract." (3) That is a correct definition of a wagering contract, and the present case is within it.

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person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid."

(1) 60 L. J. (M.C.) 116.

(2) [1892] 2 Q. B. 484; affirmed in the Court of Appeal [1893] 1 Q. B. 256.

(3) [1892] 2 Q. B. at pp. 490, 491.

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[POLLOCK B. What do the respondents in the present case win?]

The pennies paid by the competitors.

[WRIGHT J. There is no finding of an intention to enter into a wagering contract.]

If such a finding is essential the case should be remitted.

[He also referred to *Wright* v. *Clarke*, *Morris* v. *Clarke*, *Smith* v. *Clarke* (1); *Cox* v. *Andrews* (2); *Reg.* v. *Brown.* (3)]

Carson, *Q.C.* (*Grain*, and *L. W. Kershaw*, with him), for the respondents, was not heard.

POLLOCK B. I in no way propose to give any definition as to what is, and what is not, betting, for I think it undesirable to attempt to give any general definition. It is clear to my mind that, in the present case, the transaction which has taken place did not amount to betting. The alderman has stated his opinion that the facts stated in the case were not sufficient in law to support any of the offences charged. That finding is well within his province, and if it was desired that any further question should be decided by him, he should have been asked for a further finding. The defendant has been acquitted, and we will not send back the case to be reconsidered. The view which I have expressed, that this transaction does not amount to betting, is strengthened by the judgment of Day J. in the case which was referred to in argument: *Caminada* v. *Hulton.* (4) Speaking of the transaction proved in that case, which was very similar to that proved here, he says: "Clearly it is not a bet at all. Any person who gets hold of one of these pieces of paper becomes entitled, according to the terms of this arrangement, to get a prize of a large sum of money in the event of his succeeding in guessing the names of the winners of the six particular races; it is really not a bet; it is a scheme—a device—for the purpose, no doubt, of furthering the business which the respondent carries on, enabling him to sell more largely this Handicap Book or Racing Record, with which these tickets or coupons are issued.

(1) 34 J. P. 661.
(2) 12 Q. B. D. 126.
(3) [1895] 1 Q. B. 119.
(4) 60 L. J. (M.C.) 116.

In my judgment it certainly is not a bet." (1) That is clear, sound, and vigorous reasoning, and shews that such transactions as those proved in that case, and in the present, do not amount to betting.

In the other case before us, which was heard first of the two, I am clearly of opinion that the facts stated do not shew anything amounting to a lottery.

For these reasons I am of opinion that, in the first case, *Stoddart* v. *Sagar*, the conviction ought to be set aside, and in the second case, *Sagar* v. *Stoddart*, our judgment ought to be for the respondents.

WRIGHT J. I am of the same opinion. In the first case, I think the facts stated clearly do not amount to a lottery.

In the second case, which arises under the Betting Act, 1853 (16 & 17 Vict. c. 119), I think the facts do not amount to betting. No doubt it is possible that under certain circumstances such a competition as this may be a betting transaction, for a case can be suggested where the facts might be so found as to shew that it was. For instance, if it were found that a place was used for the purpose of money being received as the consideration for a promise to pay money on an event or contingency of or relating to a race, that might amount to a finding that the contract was a wagering contract, and the Betting Act might be held applicable; but there is no such finding in the present case.

In Stoddart v. *Sagar, Conviction quashed.*
In Sagar v. *Stoddart, Judgment for respondents.*

Solicitors for Stoddart: *C. O. Humphreys, Son & Kershaw.*
Solicitor for Sagar: *H. H. Crawford, the City Solicitor.*

(1) 60 L. J. (M.C.) at pp. 121, 122.

P. B. H.

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[CROWN CASE RESERVED.]

THE QUEEN *v.* WAUDBY.

Criminal Law—Aiding and Abetting—Indictment for Felonious Wounding—Conviction of Principal for Unlawful Wounding.

Upon the trial of an indictment against two prisoners charging one with feloniously wounding with intent to do grievous bodily harm and the other with aiding and abetting in the commission of the felony, if the principal be convicted of the misdemeanour of unlawfully wounding, the second prisoner may be convicted of aiding and abetting him.

Case stated by Lawrance J.

John Waudby and William Waudby were tried upon an indictment which charged John Waudby with feloniously, unlawfully and maliciously shooting at William Featherstone with intent to do him grievous bodily harm, and William Waudby with feloniously aiding, abetting and assisting John Waudby to commit the said felony. A second count charged John Waudby with feloniously, unlawfully and maliciously wounding William Featherstone with intent to do him grievous bodily harm, and William Waudby with feloniously aiding, abetting and assisting.

The jury found John Waudby guilty of unlawfully wounding, and William Waudby guilty of aiding and abetting. It was objected on behalf of William Waudby that as he was aiding and abetting a misdemeanour he was entitled to be acquitted on the said indictment. The learned judge overruled the objection and released William Waudby on recognisances to come up for judgment when called upon. The question for the Court was whether the learned judge was right in so holding.

No counsel appeared to argue the case.

Lord Russell of Killowen C.J. I am of opinion that the ruling of the learned judge was clearly right. The charge was one of felony, John Waudby being charged as the principal, and William Waudby with aiding and abetting; the jury negatived

the felony, but found John guilty of a misdemeanour, and William of aiding and abetting. Where a person is charged with aiding and abetting, if he is found guilty of aiding and abetting a misdemeanour, he is guilty as a principal, for there are no degrees of guilt in misdemeanour. The statutory authority upon the point raised seems clear. By 14 & 15 Vict. c. 19, s. 5, if a prisoner is charged with feloniously wounding (1) and the jury are satisfied that he is guilty of the actual wounding but not of the felony, they may acquit him of the felony charged, and convict him of the misdemeanour of unlawfully wounding. And by 24 & 25 Vict. c. 94, s. 8, a person aiding or abetting in the commission of a misdemeanour is liable to be tried, indicted and punished as a principal. Here the jury have negatived the felony, and, there being no secondary guilt in misdemeanour, the prisoner William was a principal offender, and was liable to be convicted and punished as such.

POLLOCK B., GRANTHAM, LAWRANCE and WRIGHT JJ. concurred.

Conviction affirmed.

(1) It should be observed that this enactment is limited to cases "where the indictment alleges that the defendant did cut, stab or wound," and that in *Reg.* v. *Miller* (14 Cox, 356), Archbold's Criminal Pleading, p. 745 (21st ed.), Bowen J. held that upon an indictment charging a felonious shooting with intent to grievous bodily harm, and doing grievous bodily harm with intent to do grievous bodily harm, it was not competent for the jury to convict of unlawfully wounding. [Reporter.]

W. J. B.

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July 27.

[CROWN CASE RESERVED.]

THE QUEEN *v.* FARNBOROUGH.

Criminal Law—Larceny—Animus Furandi—Function of Jury.

Upon a trial for larceny the question whether the goods were taken animo furandi is a question of fact for the jury.

A prisoner was tried at quarter sessions for larceny; at the conclusion of the case the jury announced that they had not agreed upon their verdict. They were then asked by the chairman whether they believed the evidence for the prosecution, and answered the question in the affirmative; the chairman then directed a verdict of guilty to be entered:—

Held, that the conviction was bad, there having been no finding by the jury that the prisoner had acted animo furandi.

Case stated by the chairman of the Middlesex Quarter Sessions in the following terms.

The prisoner was charged with stealing milk. The facts of the charge are immaterial to this case. It appeared to me that, if the jury believed the evidence for the prosecution the prisoner was in law guilty as charged, and I so directed them. No evidence except as to character was called for the defence, and the counsel for the defence did not seriously dispute my ruling. The jury retired to consider their verdict; and after they had been absent some time I sent for them and asked if they were agreed, and they replied that they were not. I then asked them, did they believe the evidence for the prosecution, and the foreman replied that they did. Counsel for the prisoner objected that no question could be asked except the ordinary ones, "Are you agreed in your verdict?" and "Do you find the prisoner guilty or not guilty?" I overruled the objection, and directed the jury that their verdict amounted to one of guilty, and it was so recorded; but I released the prisoner on his own recognizance pending the decision of this case.

It is laid down in 4 Bl. Com. (ed. 1813), p. 328: "Such public or open verdict may be either general, Guilty or Not Guilty; or special, setting forth all the circumstances of the case and praying the judgment of the Court whether, for instance, on

the facts stated it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law and therefore choose to leave it to the determination of the Court; though they have an unquestionable right of determining upon all the circumstances and finding a general verdict if they think proper so to hazard a breach of their oaths." He then goes on to shew how, by laws either since repealed or fallen into desuetude, such jurors cannot be punished.

The question is, Had I the power to put the question and direct such verdict to be recorded, the facts in the judgment of the Court clearly constituting in law the offence charged, if proved to the satisfaction of the jury?

Hutton, for the prisoner, was not called upon to argue.

Gratia, for the prosecution, intimated that he could not argue in support of the conviction.

LORD RUSSELL of KILLOWEN C.J. If this case did not raise a question of very considerable public importance, I should be content to say that this conviction cannot be allowed to stand. In dealing with the important question raised we must confine ourselves to what is stated in the case itself, from which it appears that the course which the proceedings took may be described thus. The prisoner was charged with stealing milk; evidence was called in support of the charge, and the case was left to the jury on that evidence, no witnesses, except as to character, being called for the defence. The jury retired to consider their verdict, and some time elapsed, during which they made no communication to the chairman as to any point of difficulty in the case; the chairman then very properly sent for them, and asked if they were agreed on their verdict; they answered that they were not; whereupon he asked them whether they believed the evidence given for the prosecution. I do not stop to inquire whether he was right in inviting the opinion of the jury in this shape; the foreman, however, answered that question in the affirmative; whereupon the chairman said that their answer amounted in law to a verdict of guilty, and directed that verdict to be recorded. But what did that answer of the

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THE QUEEN v. FARNBOROUGH.

Lord Russell C.J.

foreman amount to, assuming that it expressed the opinion of the rest of the jury? The foreman, as the mouthpiece of the jury, had said that they were not agreed; and at the second question put to him he answered that they believed the evidence for the prosecution. What did that amount to? That they had heard certain witnesses depose to certain facts, and that they believed they were telling the truth. But it is quite consistent with the credit of the witnesses that the facts proved by them were not such as to shew an animus furandi on the part of the prisoner, which is an essential ingredient of the crime of larceny; the jury might have assumed that the prisoner took the milk by leave, or that he intended to pay for it, or that the matter was too trivial to justify a conviction; indeed, it is easy to see that the facts might be such as to justify the jury in believing the evidence, and yet declining to draw the inference that the prisoner had any animus furandi. The chairman in effect drew that inference himself, and found that the prisoner had acted with a guilty intent—a fact essential to be found before his guilt could be established; in doing so he went beyond his function, and infringed the well-established principle that the jury are to decide all questions of fact and the judge only questions of law.

POLLOCK B. I entirely agree, and should add nothing but that I am anxious to say that our present decision must not be taken in any way to affect the right of a jury in appropriate cases to find a special verdict. If a special verdict includes all the evidence required to find a prisoner guilty of the offence charged, the judge may act upon it and direct a verdict of guilty to be entered; but it cannot be suggested in the present case that the answer of the jury in any way amounted to a special verdict.

GRANTHAM, LAWRANCE, and WRIGHT JJ., concurred.

Conviction quashed.

Solicitor for prosecution: *C. H. Mason.*
Solicitor for prisoner: *H. Firth.*

W. J. B.

SOUTHWELL v. GOVERNORS OF ROYAL HOLLOWAY COLLEGE, EGHAM.

1895
May 23;
July 12.

Revenue—Inhabited House Duty — Exemptions — "Charity School"—College partly self-supporting—48 Geo. 3, *c.* 55, *Sched. B., Exemptions, Case* 4—14 *&* 15 *Vict. c.* 36, *s.* 2.

By 48 Geo. 3, c. 55, Sched. B. (repealed by 4 & 5 Wm. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36), "any hospital, charity school, or house provided for the reception or relief of poor persons" is exempted from inhabited house duty.

The Royal Holloway College was established to enable young women to carry on their studies after leaving school with all the advantages of collegiate life. The buildings had been erected by the founder at his own cost upon land provided by him, and the institution had been endowed by him with a sum of 300,000*l.*, which he directed to be applied in furnishing the college, founding scholarships and prizes, paying the salaries of teachers and professors, and otherwise in defraying the domestic and other expenses. Each student paid a sum of 90*l.* a year in fees for board, lodging and instruction, and had a bed-room and sitting-room to herself, and the use of the dining-hall, &c., in common with the other students. There were certain extra charges not included in the 90*l.*, and entrance and other scholarships and prizes had been founded in accordance with the founder's intention. At the date of the assessment the net fees received from the students, after deducting the value of the scholarships, was rather more than half the income derived from the endowment fund:—

Held, that the liability to pay inhabited house duty depended upon the character of the institution; and that as the college was not primarily intended for the supply of gratuitous education, it did not come within the exemption in favour of "charity schools" in 48 Geo. 3, c. 55, Sched. B.

Case stated by Commissioners of Income Tax under 43 & 44 Vict. c. 19, s. 59, upon an appeal by the governors of the Royal Holloway College, Egham, against an assessment of 6300*l.* to inhabited house duty made upon the building used for the purposes of the college.

From the statements in the case, and the documents which accompanied and formed part of it, it appeared that the college was established to enable young women to carry on their studies after leaving school, and under specially healthy conditions, and with all the advantages of a collegiate life, and that it provided the instruction necessary for London degrees and for the pass and honours examinations at Oxford. The building, which stood in its own grounds and gardens, included chapel, dining-hall,

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gymnasium, library, reading-room, museum, lecture theatre, lecture-rooms, scientific laboratories, common-rooms, and a picture gallery containing a valuable collection of modern British paintings. The buildings had been erected at his own cost by the late Thomas Holloway, upon ground provided by him, and the institution had been endowed by him with a sum of 300,000*l.*, which he directed to be applied in furnishing and equipping the college, founding scholarships and prizes, paying the salaries of the professors and teachers, and otherwise in defraying the domestic and other expenses of the establishment. Each student paid 90*l.* a year in fees for board, lodging and instruction, and had a bed-room and sitting-room to herself fitted with all necessary furniture, and there were certain rooms, such as dining-hall, music-hall, &c., common to the use of all the students. There were certain extras, such as doctor's fees, fees for examinations, laundry charges, &c., and scholarships and prizes had been founded in accordance with the intention of the founder.

The governors submitted in support of their claim for exemption from inhabited house duty that the college was a charity school, inasmuch as it was not self-supporting and could not be carried on under the trust without the aid of a substantial endowment. They contended that the college came within the exemption in 48 Geo. 3, c. 55, Sched. B, Case 4, of "any hospital, charity school, or house provided for the reception or relief of poor persons"; and in further support of this contention the following statement, shewing that a substantial proportion of the income of the college was derived from charitable sources, was handed in:—

Year.	Nominal fees from Students.	College Scholarships.	Nett receipts from Students.	Charitable Endowment under the trust and other benefactions.
	£	£	£	£
1889–90	4350	1320	3030	7088
1890–91	5700	1705	3995	7585
1891–92	6420	1960	4460	8908
1892–93	7110	2475	4635	7693
			16,120	31,274
	Average for last four years		4030	7818

They also relied on the case of *Governors of Charterhouse School* v. *Lamarque* (1) in support of their contention.

It was contended by the surveyor of taxes that the college was not a charity school within the meaning of 48 Geo. 3, c. 55, Sched. B, inasmuch as a proportion of the students paid large fees, and that the present case was governed by the decision in *Governors of Charterhouse School* v. *Lamarque*. (1)

The Commissioners were of opinion that the college was exempt from inhabited house duty, and discharged the assessment. The surveyor of taxes appealed.

The question for the opinion of the Court was whether the college buildings were exempt from inhabited house duty as coming within the exemption in 48 Geo. 3, c. 55, Sched. B. (2)

Sir R. T. Reid, *A.-G.* (*Sir F. Lockwood*, *S.-G.*, and *Danckwerts*, with him), for the appellant. The respondents are liable to pay inhabited house duty. The test of the right to exemption is, according to the decisions in *Governors of Charterhouse School* v. *Lamarque* (1) and *Cawse* v. *Nottingham Lunatic Hospital* (3), the character of the institution itself at the time of the assessment; and applying that test, this college was not a charity school within the meaning of the exemption in 48 Geo. 3, c. 55, Sched. B. That exemption must be confined to schools which are charities in the common acceptation of that term.

Channell, *Q.C.* (*C. Gregson Ellis* with him), for the respondents. The college is a "charity school" within the meaning of the exemption. Where on the one hand an institution is wholly supported by its endowment, and where on the other hand it has no endowment, but is entirely self-supporting, no difficulty can arise; but where it is partly supported by its endowment and partly by fees, it is a question of fact and of degree as to whether it comes within the exemption or not. An institution need not be purely charitable in order to be entitled to the benefit of the exemption; it may be so entitled although possessed of a substantial charitable endowment: *Cawse* v. *Nottingham Lunatic*

(1) 25 Q. B. D. 121.

(2) By 48 Geo. 3, c. 55, Sched. B., Exemptions, Case 4: "Any hospital, charity school, or house provided for the reception or relief of poor persons" is exempt from the inhabited house duty.

(3) [1891] 1 Q. B. 585.

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Hospital (1); *Blake* v. *Mayor of London.* (2) This institution may come within the exemption in favour of a "charity school," although its benefits are not confined to poor persons: *Commissioners of Income Tax* v. *Pemsel.* (3)

Sir R. T. Reid, A.-G., in reply.

[The case of *Commissioners of Inland Revenue* v. *Scott* (4) was also cited during the arguments.]

Cur. adv. vult.

July 12. The following written judgments were delivered:—

GRANTHAM J. In this case we are asked to say whether the buildings belonging to and used by the Royal Holloway College for the education of women come within the exemption from inhabited house duty allowed to charity schools under Sched. B of 48 Geo. 3, c. 55. In other words, we have to determine whether or not Holloway College is a "charity school" within the meaning of that exemption, and whether the young ladies enjoying the benefit and with all the luxuries of a collegiate education are charity scholars. The Commissioners have held that they are; that is, that the buildings are exempt as a charity school.

The first point—a preliminary one—that we have to determine is whether the question is one of fact or of law: if it is one of fact, we have no power to alter the decision of the Commissioners; if of law, we have. If it is one of fact, it is only necessary to read the prospectus and report of the governors to see that the Commissioners have decided wrongly, though we could not correct their decision; for it is impossible to contend as a fact of everyday life that a school or college where every student pays 90*l.* a year can be a charity school, and it can only be so treated by a fiction of law; while, as it is admitted that the Commissioners arrived at their decision in consequence of their application to this case of certain legal decisions on the interpretation of the word "charity" as applied to trust estates, I have no doubt that this is a question of law, and one on which our decision is properly sought.

(1) [1891] 1 Q. B. 585.
(2) 19 Q. B. D. 79.
(3) [1891] A. C. 531.
(4) [1892] 2 Q. B. 152.

Before attempting to apply the law as laid down in other cases, let us see clearly what the facts are, because if the facts are different the application of the same law must be wrong. The college was built "to enable young women to carry on their studies after they have left school under specially healthy conditions and with all the advantages of a collegiate life," and provision is accordingly made for instruction in all the higher branches of education. Now, it may be that under modern ideas of the higher education of the masses all these advantages may some day or other be provided for those who are the objects of charity; but can it be said in this case that they are provided for those who are the objects of charity when we find that the recipients of these advantages have to pay—and therefore can afford to pay—for them 30*l.* a term, that is 90*l.* a year, payable in advance, besides extras for doctors, fees for examinations, and all the inevitable extras to be found in high-class ladies' schools, the charges for which come to from three guineas to five guineas a term, or nine guineas to fifteen guineas a year, making for the combined advantages the large sum of 146*l.* 16*s.* per annum, and that too with laundry charges, which are also another extra? And yet this college, it is said, is to be called a charity school. Surely the bare statement of these facts answers the question, and no law can be so illogical as to say that legally this is a charity school. I have not forgotten that large sums are given by way of scholarships which reduce the cost of the education to those who obtain them; but they are not given on account of poverty, but on account of intellectual merit, and those least requiring pecuniary aid may, and often do, obtain them; so that the existence of these scholarships does not really affect the question.

Why is it, then, that it is suggested that this is a "charity school"? Because, it is said, so large a part of the expenses of the college are met by the endowment fund provided by a generous donor, and the existence of that fund brings it within the principle of previous decisions on this question, and we are bound by those decisions. True it is that at present a large proportion is so provided; but that is only temporarily so, and year by year, as the college increases in numbers, that proportion

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will diminish. The endowment fund may be taken to be a fixed fund of 7500*l.* a year, whilst the fund derived from fees in the year 1893, making reduction in respect of scholarships, was also about the same, namely, 7500*l.*; and as the gross annual expenditure was about 15,000*l.* in 1892–3, fees provided about half. But that was the proportion when the college had only ninety students, whereas with a complement of 200 students, for which the college was erected and endowed, the proportion will be —endowment fund, 7500*l.*, and fees, 18,000*l.*, without any extras, or, in other words, about one-fourth only will be derived from endowment funds; while the annual application of the funds makes the endowment proportion still less important, for I find that even now the fees received are far more than sufficient to pay the whole cost of tuition and household expenses, the figures being—fees, 7564*l.*; tuition and household expenses, 5876*l.*

Notwithstanding this anomalous state of things, it may be, however, that we are bound by precedent or by decisions of judges in other cases. I can find, however, no case which is applicable to such facts as these; the nearest case to them is *Governors of Charterhouse School* v. *Lamarque* (1), where it was held that the school was not a charity school. I admit that the proportion the income from endowed funds bore to the amounts paid by the boys was apparently less than in this case, but the principle was the same. Originally that school was formed for the purpose of providing a gratuitous education entirely; now, its main object is not to provide a gratuitous education, but to provide for those who can pay the necessary fees of a high-class public school; and it must not be forgotten that the Charterhouse School buildings at Godalming were, as I understand it, originally built out of endowment money in the same way that the buildings were erected at the Holloway College, so that free buildings do not make a charity school; and as the primary object of this college is not free education, but the highest class education combined with the luxuries of college life, it would require a very strong authority to make me conclude that this was a "charity school." I do not forget that I was pressed very fairly during the course of the argument with

(1) 25 Q. B. D. 121.

my own judgment in *Reg.* v. *Commissioners of Income Tax (Pemsel's Case)* (1), as that judgment was afterwards upheld in the Court of Appeal and in the House of Lords—a judgment given by me with a good deal of hesitation, as I was differing alone from the unanimous judgment of three Scottish judges of great eminence, and of the then Lord Chief Justice of England, Lord Coleridge; but not only were the circumstances there entirely different, but the section of the Income Tax Act which we had to interpret and apply was an entirely different section from this. There we had to determine what was a "charitable trust," and the moment you get into trusts you come within the range of innumerable decisions of the Court of Chancery; and the fact that the Income Tax Acts had specially relieved property applied to charitable trusts from paying income tax is a long way from shewing that buildings in which charitable trust funds are applied in the maintenance of the buildings, and partial provision and education of the inmates, are not profitably used when the inmates themselves pay annually so large a sum for the advantages they derive as is paid by them in this college. I quite agree with the decision of my brother Charles in *Carse* v. *Nottingham Lunatic Hospital* (2) that the word "poor," in the exemption of "house provided for the reception or relief of poor persons," only applies to the "house" so provided; but we must not forget that the other words in the schedule, "hospital or charity school," indicate buildings for the use of which no pecuniary advantage is obtained; and in interpreting the word "charity" you cannot, therefore, divorce it from the word "school"; so that we have not to determine what is a "charity" or what is a "charitable purpose," which has been the question in so many of the cases cited during the argument, but what is a "charity school." I have not alluded to the other cases cited during the course of the arguments, because I can find nothing in the judgments there delivered helping us to a decision in this case; but, for the reasons above given, in my judgment this college and buildings are not exempt from inhabited house duty as coming within the exemption of the Act 48 Geo. 3, c. 55, Sched. B.

(1) 22 Q. B. D. 296. (2) [1891] 1 Q. B. 585.

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CHARLES J. The question in this case is whether the Royal Holloway College at Egham is exempt from inhabited house duty. The Commissioners, to whom the governors of the college appealed against the assessment which had been made upon them, were of opinion that the college was exempt, upon the ground that it was a "charity school" within the meaning of 48 Geo. 3, c. 55, Sched. B. By that statute (which was repealed by 4 & 5 Wm. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36) "any hospital, charity school, or house provided for the reception or relief of poor persons" is exempted from inhabited house duty. The cases which have been decided upon this schedule have reference to three classes of institutions: firstly, institutions wholly self-supporting; secondly, institutions wholly dependent upon endowments; and, thirdly, institutions partly supported by endowments and otherwise self-supporting. With regard to the first case, there is no doubt that they do not come within the exemption, which, it has been held, must be restricted to institutions maintained wholly or in part by charity. Thus, in *Needham* v. *Bowers* (1), an endowed hospital for the reception of insane persons, founded by charitable donations but supported entirely out of payments made by the patients, was held not to be exempt. With regard to the second case, there is equally no doubt that they do fall within the exemption, whether they be "hospitals," "charity schools," or "houses provided for the reception or relief of poor persons."

It is in the third class of cases—the class to which Holloway College admittedly belongs—that we meet with points of difficulty. It has, however, been decided that the exemption does apply to an institution possessed of a substantial charitable endowment, notwithstanding the fact that it also derived income from the payments made by inmates sufficient in some years to cover the whole expenditure: *Cawse* v. *Nottingham Lunatic Hospital*. (2) But the applicability of the exemption can hardly depend upon the exact proportion in any particular year between the income from endowments and that from other sources. It must depend, I think (as was pointed out in *Cawse* v. *Nottingham*

(1) 21 Q. B. D. 436. (2) [1891] 1 Q. B. 585.

Lunatic Hospital (1)), not upon the consideration of any particular year, but upon the character of the institution itself. This, moreover, was the test applied in *Governors of Charterhouse School* v. *Lamarque* (2), where the Court held that the modern school of Charterhouse was not a "charity school," although considerable benefit was derived from the funds of the original foundation, especially in regard to scholarships and exhibitions. The question is there treated as one of degree, to be determined upon the facts of each particular case. And this seems to me to be the only satisfactory way of dealing with the matter. The facts of the case must first be ascertained, and then the question of law arises whether those facts bring the particular hospital or school whose liability is under consideration within the exemption clause.

The question, then, to be determined is, What is the character of Holloway College? Can it be said to be, taken as a whole, a charity school? Now, I do not propose to attempt any definition of the word "charity" as used in Sched. B. But I think there can be no doubt that the language of the schedule contemplates institutions whose primary object is the maintenance or education of those who cannot in the one case afford to maintain themselves, or in the other to pay for their own education—institutions, in other words, eleemosynary in character. A "hospital" certainly is primarily intended to receive patients who do not pay for their treatment. "A house provided for the reception or relief of poor persons" is a poor-house, and nothing else. And the words "charity school" must, in my opinion, be interpreted, having regard to the preceding and succeeding words, as "school primarily intended for the supply of gratuitous education." If that condition is fulfilled, then the exemption will be available, even although the pupils who are educated contribute towards the expense of education; just as a "hospital" remains a hospital entitled to exemption although in a particular year it may receive fees to a large amount from paying patients. But in the case of Holloway College there does not appear to have even been an intention to supply gratuitous instruction to any pupil, rich or poor. I say "rich or poor," for I respectfully

(1) [1891] 1 Q. B. 585. (2) 25 Q. B. D. 121.

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agree with the observations of Lord Herschell and Lord Macnaghten in *Commissioners of Income Tax* v. *Pemsel* (1), to the effect that many "charities" may exist which are not for the relief of mere pecuniary necessity. The object of the founder of the college was to enable young women "to carry on their studies after they have left school under specially healthy conditions and with all the advantages of a collegiate life." Instruction is provided for the degrees of the London University and for the pass and honours examinations at Oxford. The college was opened for work in October, 1887, in buildings erected by Thomas Holloway at Egham, at his own cost, upon land provided by him between the years 1876 and 1883. In the latter year he endowed the college with a sum of 300,000*l.*, and directed that sum to be applied for the benefit of the college, in paying off the building debt (if any), in furnishing and equipping the college, in establishing scholarships, exhibitions and prizes, in paying the salaries of professors and teachers, and otherwise in defraying the domestic and other expenses incurred. The average income from the endowment under the trust and from other benefactions for the last four years has been 7800*l.* per annum, and is at present largely in excess of the income received from the fees of students, who, however, are rapidly increasing in number. The students pay 90*l.* each a year, which covers all expenses except laundress, medical attendance, fees for university examinations, and individual lessons in special subjects. For this sum each student no doubt receives, in consequence of the mode in which the endowment fund is used, more educational advantages and greater material comforts than could be supplied to her in return for the fees she pays. Does this circumstance make the college a "charity school"? I think not; and I base this opinion, not upon any comparison between the receipts in any particular year from fees and those from endowment, but upon the view which I take of the character of the institution itself. It was not in its origin and never has been one of an eleemosynary character; and the mere fact that in a boarding school in which a considerable fee is charged the inmates obtain various advantages and comforts from the endowment is not

(1) [1891] A. C. at pp. 571, 583.

sufficient, in my opinion, to constitute the school a "charity school." For these reasons, I think that our judgment in this case must be for the appellant.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Ewart Jukes & Gore, Egham.*

W. J. B.

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July 31.

THE WOOLWICH LOCAL BOARD OF HEALTH, APPELLANTS;

GARDINER AND ANOTHER, RESPONDENTS.

Pedlar — Certificate — Market — Pedlar using Horse and Cart — Hawker — Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14), *s.* 13—*Pedlars Acts*, 1871 (34 & 35 *Vict. c.* 96), *ss.* 3, 6; 1881 (44 & 45 *Vict. c.* 45), *s.* 2.

By the Markets and Fairs Clauses Act, 1847, s. 13, "Every person other than a licensed hawker" is liable to a penalty for selling, within the limits prescribed by the special Act authorizing a market, except in his own dwelling-place or shop, articles in respect of which tolls are authorized to be taken in such market.

By the Pedlars Act, 1871, s. 3, a pedlar is defined as a "hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot." By s. 6 a pedlar's certificate granted under this Act authorizes the person to whom it is granted to act as a pedlar within the police district in which it is taken out; and "for the purposes of the Markets and Fairs Clauses Act, 1847, and any Act incorporating the same, a certificate under this Act shall have the same effect within the district for which it is granted as a hawker's licence, and the term 'licensed hawker' in the first-mentioned Act shall be construed to include a pedlar holding such a certificate." By the Pedlars Act, 1881, s. 2, the operation of a certificate granted under the Act of 1871 is extended to the United Kingdom:—

Held, that a person holding a pedlar's certificate was only entitled to the exemption provided by the Markets and Fairs Clauses Act, s. 13, as extended by the Pedlars Act, 1871, s. 6, whilst he was acting as a pedlar within the definition of that term in s. 3 of the last-mentioned Act, and therefore that the holder of such a certificate who used a horse and cart and sold tollable articles in a market was liable to a penalty.

Howard v. *Lupton* (L. R. 10 Q. B. 598) not followed.

CASE stated by a metropolitan police magistrate under the Summary Jurisdiction Acts.

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The respondents were summoned at the Woolwich Police Court to answer a complaint, made by the appellants under s. 13 of the Markets and Fairs Clauses Act, 1847 (1), alleging that the respondents had sold or exposed for sale in a cart drawn by a horse, within the Woolwich police district and within the limits of the market owned by the appellants, certain articles, namely, potatoes, in respect of which tolls were authorized to be taken in the said market.

The case stated as follows: At the hearing of the complaint the facts alleged therein were proved, and it was proved or admitted that the appellants were a local authority within the meaning of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Pedlars Act, 1871, and as such authority were the owners of a market to which s. 13 of the Markets and Fairs Clauses Act, 1847, applied, and that a portion of such market had been set aside by the appellants in which vehicles might be stood upon payment of 2*s.* 6*d.* a day.

(1) The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13: "After the market place is open for public use every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings."

The Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 3: "The term 'pedlar' means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot and goes from town to town or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandize, or procuring orders for goods, wares, or merchandize immediately to be delivered, or selling or offering for sale his skill in handicraft."

Sect. 6: "A pedlar's certificate granted under this Act shall, during the time for which it continues in force, authorize the person to whom it is granted to act as a pedlar within the police district in which the certificate is taken out. For the purposes of the Markets and Fairs Clauses Act, 1847, and any Act incorporating the same, a certificate under this Act shall have the same effect, within the district for which it is granted, as a hawker's licence, and the term 'licensed hawker' in the first-mentioned Act shall be construed to include a pedlar holding such a certificate."

The Pedlars Act, 1881 (44 & 45 Vict. c. 45), s. 2: "A pedlar's certificate granted under the Pedlars Act, 1871, shall during the time for which it continues in force authorize the person to whom it is granted to act as a pedlar within any part of the United Kingdom."

It was also proved that neither of the respondents held a hawker's licence, and that each of them held a pedlar's certificate obtained under the Pedlars Act, 1871.

The magistrate was of opinion, on the authority of the decision in *Howard* v. *Lupton* (1), that he was bound to dismiss the summons, and he accordingly did dismiss it.

The question for the opinion of the Court was whether or not he was bound in law to dismiss the summons.

R. C. Glen (*Channell, Q.C.*, with him), for the appellants. The case finds that the respondents were selling the potatoes from a cart drawn by a horse. They were, therefore, not acting as "pedlars" within the definition of that term in s. 3 of the Pedlars Act, 1871, and were not protected under s. 6 by their certificates. The term "licensed hawker" in the Markets and Fairs Clauses Act, 1847, is not intended to be construed as including a person holding a pedlar's certificate under the Act of 1871 whilst such person is acting otherwise than as a "pedlar" must act in order to come within the definition in s. 3. The decision in *Howard* v. *Lupton* (1) ought not to be followed. It is submitted that the view taken by Lush J., who dissented from the majority of the Court in that case, was right. When *Howard* v. *Lupton* (1) was decided the cheaper pedlar's certificate only gave a person holding it protection within the police district in respect of which it was granted, whilst the more expensive hawker's licence gave the hawker protection throughout the whole country; but since the passing of the Pedlars Act, 1881, a person holding a pedlar's certificate is protected in acting as a pedlar within any part of the United Kingdom. Blackburn and Mellor JJ. would, as their judgments shew, probably have come to a different conclusion if that state of things had then existed. The magistrate was wrong in coming to the conclusion that he was bound in law to dismiss the summons.

Travers Humphreys, for the respondents. The decision in *Howard* v. *Lupton* (1) is in point, and is binding upon the Court in the present case. The extension of authority to act as a

(1) L. R. 10 Q. B. 598.

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pedlar given by s. 2 of the Pedlars Act, 1881, cannot have affected the true construction of s. 6 of the Act of 1871. Under s. 7 of the last-mentioned Act a person holding a pedlar's certificate could by the payment of a fee not exceeding 6*d.* obtain an indorsement of his certificate authorizing him to act as a pedlar in any other police district in the country. The respondents plainly come within the terms of s. 6, and are entitled to be treated in all respects as "licensed hawkers," who may sell with horses and carts.

GRANTHAM J. We are both, I think, of opinion that we are not bound by the case of *Howard* v. *Lupton* (1), and that we ought not to follow that decision. The question is, whether the respondents are protected by s. 6 of the Pedlars Act, 1871—that is to say, whether they were entitled to sell the articles in question without paying the market tolls. Sect. 3 gives a definition of the term "pedlar," and s. 6 provides that a pedlar's certificate granted under the Act "shall have the same effect within the district for which it is granted as a hawker's licence"—namely, the effect of exempting the holder from the payment of tolls—and that the term "licensed hawker" in the Markets and Fairs Clauses Act, 1847, "shall be construed to include a pedlar holding such a certificate." I am of opinion that the correct interpretation of s. 6 is that the term "licensed hawker" in the Act of 1847 must be construed to include a person holding a pedlar's certificate only whilst he is acting as a "pedlar" within the definition of that term in s. 3. If a person holding a pedlar's certificate is not acting as a "pedlar" within that definition he is, in my view, no longer protected by the statute. In this case the respondents were not so acting as "pedlars," because by the definition a pedlar must be a person "who, without any horse or other beast bearing or drawing burden, travels and trades on foot," and the respondents were, at the time specified in the summons, selling or exposing articles for sale in a cart drawn by a horse. Under those circumstances I think that they were not protected by the Act, and the magistrate was not bound in law to dismiss the summons.

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WRIGHT J. I am of the same opinion. I need only say, with respect to *Howard* v. *Lupton* (1), that I agree with the view taken by Lush J. in that case. I am not at all sure that both Blackburn J. and Mellor J. would not have arrived at a different conclusion if the provision enacted by s. 2 of the Pedlars Act, 1881, had been in existence at that time; because, as I read the judgments, the minds of both those learned judges were influenced by the consideration that, by the Act of 1871, a pedlar's certificate only applied to the area of the police district in respect of which it was taken out. I am of opinion that the order of the magistrate dismissing the summons must be quashed, and the case remitted to him to be further dealt with.

Case remitted accordingly.

Solicitor for appellants: *E. Hughes, Woolwich.*
Solicitor for respondents: *C. O. Pook, Greenwich.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1895
Aug. 1, 2.

ROBINS & CO. *v.* GRAY.

Innkeeper—Lien—Commercial Traveller—Goods belonging to another brought to Inn by Guest—Knowledge of Innkeeper.

A commercial traveller employed by a firm who dealt in sewing-machines went to stay at an inn, and whilst there machines were sent to him by his employers in the ordinary course of business for the purpose of selling them to customers in the neighbourhood. Before the goods were so sent the innkeeper had express notice that they were the property of the employers, but he received them as the baggage of the traveller, who subsequently left the inn without paying his bill for board and lodging:—

Held (affirming the judgment of Wills J.), that the innkeeper had a lien upon the goods for the amount of his bill.

APPEAL from the judgment of Wills J. in an action tried without a jury. (2)

The action was brought to recover from the defendant, an

(1) L. R. 10 Q. B. 598. (2) Ante, p. 78.

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ROBINS & Co. v. GRAY.

innkeeper, certain sewing-machines, the property of the plaintiffs, which they alleged were wrongfully detained by the defendant.

The plaintiffs were a firm of dealers in sewing-machines and other articles. In 1894 they had in their employment as a commercial traveller one Green, who canvassed for orders and sold their goods upon commission. In April, 1894, Green, for the purposes of his business as such commercial traveller, went to stay at the defendant's hotel, taking with him sewing-machines, the property of his employers, for the purpose of selling them to customers in the neighbourhood. He remained there until the end of July. Whilst there the plaintiffs sent to him from time to time more sewing-machines for the same purpose. At the end of July Green left the hotel without paying his bill for board and lodging, and he left there some of the machines so sent. Before the defendant received into his hotel the machines so sent, and before Green had incurred his debt for board and lodging, the defendant had been expressly told by the plaintiffs that the machines were their property, and not the property of Green; but he received the goods into his hotel as Green's baggage. The defendant claimed a lien for the amount of Green's debt upon the machines left by him at the hotel.

On the above facts the learned judge gave judgment for the defendant.

The plaintiffs appealed.

Arthur Powell and *Guy Granet*, for the appellants. An innkeeper's lien attaches only in respect of goods which he receives into his inn in his character of an innkeeper, and as the goods of the guest who brings them, or, perhaps, to whom they are sent: *Smith* v. *Dearlove*. (1) Where the innkeeper has notice that the goods so brought or sent are not the property of the guest but of some other person, and therefore does not receive them as the goods of the guest, he has no lien. His right of lien depends upon whether he is bound to receive the goods into his inn and to keep them safely as his guest's goods, and he is not bound to do either of those things if, to his knowledge, the

(1) 6 C. B. 132.

goods are not the goods of the guest. The sewing-machines in question here were not the guest's personal luggage, but merchandize sent by the plaintiffs for a temporary purpose, namely, to be kept by the guest until they could be sold in the neighbourhood. They were, therefore, like the piano hired by a guest staying at an inn in *Broadwood* v. *Granara* (1), in which case it was held that the innkeeper, who knew the circumstances under which the piano was brought into the inn, had not a lien. In all the cases the question of the innkeeper's knowledge with respect to the property in the goods has been treated as material. In *Johnson* v. *Hill* (2) Abbott C.J., and in *Turrill* v. *Crawley* (3) Coleridge J., left that question to the jury. In *Threfall* v. *Borwick* (4), the innkeeper believed that the piano which the guest had hired from the plaintiff was the guest's own property, and in *Mulliner* v. *Florence* (5) the goods were received by the innkeeper as part of the guest's own property. In *Gordon* v. *Silber* (6) Lopes L.J. in his judgment treated as material the fact that the innkeeper knew of no distinction between the goods of the husband and those which were the separate property of the wife, both having brought goods to the inn. *Robinson* v. *Walter* (7) is not in point, because the decision only was that an innkeeper had a lien upon the horse of a stranger for the keep of the horse—not for the debt of the person who brought it to the inn.

W. E. Hume Williams, for the respondent, was not called upon to argue.

LORD ESHER M.R. I have no doubt about this case. I protest against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon

(1) 10 Ex. 417.
(2) 3 Stark. 172.
(3) 13 Q. B. 197.
(4) L. R. 10 Q. B. 210.
(5) 3 Q. B. D. 484.
(6) 25 Q. B. D. 491.
(7) 3 Bulstr. 269.

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that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveller comes to an inn with goods which are his luggage—I do not say his personal luggage, but his luggage—the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveller but not his luggage. If the traveller brought something exceptional which is not luggage—such as a tiger or a package of dynamite—the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveller and his goods. He has not to inquire whether the goods are the property of the person who brings them or of some other person. If he does so inquire, the traveller may refuse to tell him, and may say, "What business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in"; or he may say, "They are not my property, but I bring them here as my luggage, and I insist upon your taking them in"; and then the innkeeper is bound by law to take them in. Again, suppose the things brought are such things as the innkeeper is not bound to take in, he may, as I have said, refuse to take them in although the traveller demands that they shall be taken in as his luggage; but if after that the innkeeper changes his mind and does take them in, then they are in the same position as goods properly offered to the innkeeper according to the custom of the realm. Then the innkeeper's liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely unless they are lost by the fault of the traveller himself. That is a tremendous liability: it is a liability fixed upon the innkeeper by the fact that he has taken the goods in; and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveller. By law that lien can be enforced, not only against the person who has brought the goods into the inn, but against the real and true owner of them. That has been the

law for two or three hundred years; but to-day some expressions used by judges, and some questions—immaterial, as it seems to me—which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn, he may refuse to take them in; or, if he does take them in, he has no lien upon them. One cannot help asking, What is his liability supposed to be if he does take in goods under such circumstances? It must be borne in mind that goods brought into an inn are not exclusively in the possession of the innkeeper; the person who brings them may deal with them: he may take them out of a box in a room or passage without the knowledge of the innkeeper, though the latter is bound to see that no one else interferes with them. Now, is there any decided case in which it has been held that, although goods have been brought to an inn as the luggage of the traveller and received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveller? There is not one such case to be found in the books. It was said that *Broadwood* v. *Granara* (1) was such a case. But there the proposition, that if a guest brings goods into an inn as his luggage they must be treated as if they were his goods, was fully recognised. The judges held in that case that a piano, not brought to the inn by the guest as his luggage, but sent in by a tradesman for the guest to play upon during his stay at the inn, was not offered to, nor taken possession of by, the innkeeper under the custom of the realm as the luggage of the guest, and therefore that the piano was not subject to the innkeeper's lien. Whether we should have agreed with that decision is immaterial. The case was expressly decided on the ground that the law of innkeepers did not apply. It is, therefore, no authority in the case now before us, where, as the learned judge in the Court below has found, the goods were brought to the inn as the goods of the traveller and accepted as his goods by the innkeeper. If we were to accede to the argument for the appellants we should be making a new law, and our decision would produce in very many cases great confusion and hardship. I am of opinion that an innkeeper is bound to take in goods with which a person who

(1) 10 Ex. 417.

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comes to the inn is travelling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches, and that the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial, This appeal should, therefore, be dismissed.

KAY L.J. In this case the appellants bring their action for the detention of certain sewing-machines of which they are the owners. The defence is, "I am an innkeeper; the goods in question came into my possession as the goods of a guest at my inn, and I have a lien upon them for the unpaid bill of that guest." Replication, "You knew that they were not his goods; you had notice that they did not belong to him, but that they belonged to us, the plaintiffs." The question is, whether that is a good replication. The facts are: The appellants' traveller went to the inn taking some sewing-machines with him, and stayed there. Whilst there other machines were sent to him by his employers, and those machines were received by the innkeeper, and were taken care of by him, and were in his possession. The traveller left without paying his bill for board and lodging at the inn. I agree with Wills J. that the fact that some of the machines were sent to the inn after the traveller had gone there does not make any difference; because the innkeeper accepted them as he had accepted the machines originally brought to the inn by the traveller—that is, as the goods of the traveller—I do not mean his property, because the innkeeper knew that they were the property, not of the traveller, but of his employers. Now, we have had an elaborate argument, and various cases have been cited in support of the appellants' case. We asked counsel if he knew of a single case in which it had been held that an innkeeper could refuse to take in goods of an ordinary description brought to his inn by a commercial traveller for sale in the neighbourhood. No case of that kind has been cited or could be found, although this business of commercial travellers has been carried on for a very great length of time, and so largely that there is scarcely an inn in England to which commercial travellers do not go with the goods of their employers. That fact is suggestive in considering the contention now put forward.

Further, there is no case to be found in the books to shew that an innkeeper would not be liable in the ordinary way for the loss of such goods so brought to his inn by a commercial traveller, and so taken in by himself. It is, therefore, clear that, if a commercial traveller goes to an inn with goods as his luggage which are the ordinary goods for sale of a commercial traveller, and the innkeeper takes him and his goods in, the innkeeper's liability in respect of those goods would be the same as in respect of the personal luggage of the traveller. That being undoubted, we have to consider whether the innkeeper's lien is defeated by reason of the fact that when he took the goods in he knew, or had had notice, that they were the property, not of the commercial traveller, but of his employers. The law is stated in *Robinson* v. *Walter* (1) by Dodderidge J., when the case first came before him, thus: "This is a common inn, and the defendant a common innkeeper, and this his retainer here is grounded upon the general custom of the land: He is to receive all guests and horses that come to his inn: He is not bound to examine who is the true owner of the horse brought to his inn; he is bound, as he is an innkeeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the horse cannot have him away, until he have satisfied the innkeeper for his meat." That is a distinct statement that this law of an innkeeper's lien is founded on the general custom of the land, and that an innkeeper is not bound to inquire to whom the goods which a guest brings to the inn belong, but is bound to receive them.

The case of *Broadwood* v. *Granara* (2) was chiefly relied on for the appellants. There a guest staying at an inn went to a shopkeeper in the town and hired a piano, which was sent to him at the inn for the purpose of playing on it during his stay there, and the innkeeper knew that the piano was so hired for that purpose, and allowed it to be brought into his inn. The Court held that he had no lien upon it; but the ground of the decision is stated as clearly as possible in the judgments. Pollock C.B. said (at p. 422): "This is the case of goods, not brought to the

(1) 3 Bulstr. 269. (2) 10 Ex. 417.

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inn by a traveller *as his goods*, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that third person. I shall not inquire whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose. Under these circumstances, I am clearly of opinion that the defendant has no lien." Parke B. (at p. 423) said: "It is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien." Then follow words which are sufficient to determine the case before us: "The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive." An analogous case to that was put by the Master of the Rolls during the argument of the present case. Suppose a jeweller in the town sent, with the knowledge of the innkeeper, certain jewels to a guest at the inn on approval, and allowed them to remain in the inn for some days—could the innkeeper claim and enforce a lien upon those jewels? I should think he could not, because they were sent for a special temporary purpose, and the innkeeper knew it; they were, therefore, not sent as the goods—I do not mean as the property—of the guest; they were not goods which he was likely to take about with him as his luggage. But, in the case before us, the goods were received into the inn as the kind of goods with which the guest was accustomed to travel in his employment as a commercial traveller; and they were the

kind of goods which the innkeeper would be bound to receive without inquiring—and he had no right to inquire- to whom they belonged. If we were to hold that the innkeeper had no lien upon them we should be effecting a complete revolution in the custom of the land, in accordance with which an innkeeper, who receives into his inn commercial travellers with the goods of their employers which the travellers bring there in the course of their business, is accustomed to believe, and has a right to believe, that he has a lien upon those goods.

A. L. SMITH L.J. A commercial traveller went in the course of business to an inn; and, according to the finding of Wills J., he took with him goods which "were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the ordinary apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while he was there." The learned judge finds in effect that the goods in question were part of the commercial traveller's baggage, and goods which the innkeeper was bound by the law of the land to take in, and to absolutely preserve as the goods of his guest. That obligation is imposed upon him by the custom of the realm. In consideration of that obligation there is given to him—also by the custom of the realm—a lien upon the goods for the value of the food and lodging supplied to the guest during the time he stays at the inn. I cannot do better than read what Lopes L.J. said in *Gordon* v. *Silber* (1): "The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title." I agree with that; it is good law, and is not disputed in this case; nor can it be disputed, because it is settled by authority. But it is said that the law so

(1) 25 Q. B. D. 491, at pp. 492, 493.

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stated does not apply if goods, brought to an inn as the goods and baggage of a commercial traveller, are not his property but the property of his employers, and that fact is known to the innkeeper when he takes the goods in. Counsel for the appellants was asked what case had decided that. He relied on *Broadwood* v. *Granara* (1), which, he said, decided that the innkeeper had no lien where goods were sent to an inn, and he knew that they were not the property of the person staying at the inn to whom they were sent. In my view the case did not decide that at all, because the piano was not sent to the inn as the guest's luggage or baggage; he hired it in the town, and it was sent for him to play upon whilst he stayed at the inn. The Court held that it was not his baggage which the innkeeper by the law of the land was bound to receive. Here the sewing-machines were received as the baggage of the commercial traveller. The question whether he was able to pledge them or not has nothing to do with the matter; the rights and liabilities of the innkeeper depend upon the custom of the realm. Some expressions of judges were relied on to the effect that an innkeeper had a lien upon goods brought to his inn by a guest, if the innkeeper did not know that the goods were not the property of the guest, but were the property of some one else. There is no decision, however, that if he did know his lien was gone. The illustration may be put of goods received by an innkeeper of which one-half belonged to the guest who brought them, and the other half to some one else. Suppose the innkeeper received all the goods with knowledge of the fact: could it be said that he was under any different obligation with respect to the goods which were the guest's and those which were not; so that, as to one half, his obligation was to keep the goods safely and securely, and, as to the other, only to take due care? In my judgment, the contention made on behalf of the appellants fails, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Collyer-Bristow & Russell, for F. Hall, Folkestone.*

Solicitor for respondent: *W. Wilkins.*

(1) 10 Ex. 417.

W. A.

THE LONDON COUNTY COUNCIL, Appellants *v.* THE CHURCHWARDENS AND OVERSEERS OF LAMBETH, Respondents.

1895
June 13;
July 29;
Aug. 8.

Poor-rate—Occupation—London County Council—Land held for the use of the Public—London Council (General Powers) Act, 1890 (53 & 54 *Vict. c. ccxliii.*), *ss.* 4, 5.

The London County Council are rateable for the relief of the poor in respect of land and buildings acquired and held by them for the use of the public under the London Council (General Powers) Act, 1890.

Case stated by consent of the parties, and by order of Bruce J., on appeal to quarter sessions against a rate.

1. In a poor-rate made by the respondents for the parish of Lambeth on April 7, 1894, the appellants are assessed, as occupiers of the premises and hereditaments hereinafter mentioned, in the second amount shewn by the extract from the rate-book as follows:—

No.	Name of Occupier.	Name of Owner.	Description of Property Rated.	No. of House and Name or Situation of Property.	Gross Estimated Rental.	Rateable Value.	Poor Rate at 1s. 9d. in the £.		
					£	£	£	s.	d.
1473	London County Council.	Blackburn J. J.	House	Norwood Road.	184	154	13	9	6
1475	London County Council.		Land	Norwood Road.	180	171	14	19	3
1483	London County Council.		Lodge	Norwood Road.	12	10		17	6
1487	London County Council.		Cottage	Norwood Road.	30	24	2	2	0

2. The appellants, the London County Council, are the governing body of the administrative county of London, and, under divers Acts of Parliament, hold, maintain, and regulate certain public parks, recreation grounds, and open spaces.

3. Previously to the passing of the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), the said hereditaments and premises, known collectively as "Brockwell Park," were in private ownership, and were included in the valuation list for the time being in force in the parish, and upon which

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the poor-rate mentioned is based, and were assessed to the poor-rate of the parish.

4. The appellants, pursuant to the powers conferred by the Act of 1890, in the year 1891 acquired the hereditaments, and the same were conveyed to them by deed dated March 26, 1891.

5. From the time the hereditaments were acquired by the appellants the appellants have been rated and assessed for the hereditaments to the poor-rates of the parish, made respectively April 11, 1891, September 26, 1891, April 9, 1892, September 29, 1892, April 8, 1893, and October 7, 1893; but payment of the rates for the hereditaments was not demanded in respect of the poor-rates made on April 11, 1891, September 26, 1891, April 9, 1892, September 29, 1892, and April 8, 1893. The house and land were from March 26, 1891, until June 6, 1892, unoccupied and unused.

6. Sects. 4 and 5 of the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), are as follows:—

Sect. 4: "The council may purchase and take by agreement certain lands, in the parish of Lambeth, in the county of London, known as Brockwell Park, . . . and, when the council shall have acquired the same, they shall hold the same, and every part thereof, as a park, and shall lay out, maintain, and preserve the same, and every part thereof, as a park, for the perpetual use thereof by the public for exercise and recreation, and may from time to time exercise all necessary powers for the maintenance and preservation of the same as a park. Provided that the council may, if they think fit, enclose the said lands, or any part thereof, with a view to the better or more effectual preservation thereof for public use; and retain, or remove, alter, enlarge, or adapt, any buildings thereon, for any purpose which they may think conducive to the public benefit."

Sect. 5: "The council may erect and maintain in the said park huts and lodges for the accommodation of keepers, constables, and other persons employed by the council in connection with the maintenance and management of the park, and also such other convenient and ornamental buildings as they may think requisite for refreshment-rooms, band-stands, conveniences, and other like purposes."

7. By the deed of March 26, 1891, the hereditaments were conveyed to the appellants, to hold the same unto and to the use of them, their successors and assigns, for ever, to the end and intent that the same might be used as and for a public park, under the provisions of the London Council (General Powers) Act, 1890, and they now hold the same under the powers and subject to the provisions in the said Act contained.

8. Brockwell Park occupies about seventy-eight acres, and is enclosed on all sides.

9. The house numbered 1473 in the rate-book (formerly the mansion-house) is a two-storied building, which has been divided by the appellants into two parts, completely separated from one another by partition walls, and entered by separate entrances, being the original front and back doors respectively of the old mansion-house.

10. Of the part which is entered by the original front door, the ground floor and basement are occupied, the same being held, for the year ending March 31, 1895, under a licence or agreement, while the upper floor, consisting of several good-sized rooms, is unused. Such last-mentioned rooms might be let to a tenant from year to year at 20*l.* a year, if right of access at all times could be given to him consistently with the provisions of the Act and the bye-laws.

11. The part which is entered by the original back door, consisting of eight living rooms and a small office, is occupied by the resident superintendent of the park and his family. Such resident superintendent is reasonably necessary for the protection and proper management of the park for the purposes of the Act. He is paid by the appellants a salary, in fixing which is taken into account the fact that he has the rooms rent-free, water and gas being found by the appellants. Similar accommodation in the way of rooms could not be found for him in the immediate neighbourhood of the park at a less rent than 40*l.* a year as tenant from year to year.

12. The buildings, yard, and premises, formerly used as coach-house, stables, and outbuildings, in connection with the mansion-house, have been partly converted for public use into a gymnasium for children, conveniences for men and women, and a

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children's shelter, and partly into a cottage for a constable to live in, consisting of four living-rooms, a carpenter's shop for the use of men specially employed by the appellants on necessary repairs in the park, a lock-up store, an office, a tool-shed, and a bothy for the men to have their meals in. The cottage, shop, store, shed, and bothy, as well as the gymnasium, conveniences, and shelter, are all properly used by the appellants for the purpose of managing the park under the Act, and it is considered necessary by the county council, and is proper for the protection of the park and its contents, that the constable should reside in the cottage. Such cottage could not be let, except at a merely nominal rent, to any one, except in connection with the whole establishment formerly constituting the mansion-house.

13. The lodge and cottage, numbered 1483 and 1487 in the rate-book, are small cottages, the former containing three rooms, and the latter containing five rooms, and having a small yard at the back, the only entrance to each being inside the park gates. These cottages are used as residences for two constables, who are allowed by the appellants to occupy them rent-free, in consideration of the extra duty they undertake of looking after the gates, of which they have keys, and protecting the park at night. It is considered necessary by the county council, and is proper for the protection of the park and its contents, that the constables should reside in the cottages. If the cottages could be let by the county council unhampered by the provisions of the Act and the bye-laws, they would fetch rents sufficient to support the figures in the rate-book.

14. All the land in the park numbered 1475 in the rate-book is open to the public at large as a park and recreation-ground during the daytime, but at night the gates are locked, and the public are not admitted. This is necessary for the protection of the park, and to prevent its being turned to improper uses at night.

15. Certain bye-laws have been made, and are applicable to the park, under s. 14 of the Act, and the constables are by warrant required to enforce the same under s. 17.

By No. 1 of such bye-laws the following acts and things are prohibited, and declared to be offences, namely, "refusing to leave

any park, garden, or other enclosed place, at or after the time of closing the gates in the evening, if requested to do so by any officer or police constable, or wilfully remaining therein after the gates are closed in the evening, or climbing on or over the gates, fences, or railings"; and by No. 2 penalties are provided for a breach of the bye-laws.

16. The grass in the park is kept down by the appellants, so as to be in a fit state for public use, partly by mowing and partly by grazing. The grazing is done under an agreement or licence with a licensee, by which such licensee is entitled to the grazing in consideration of a payment. The above is a reasonable and economical course for the appellants to take for the purpose of carrying out their duties under s. 4 of the Act.

17. Amongst other arrangements reasonable and proper for the recreation of the public, the appellants have laid out and maintain thirty lawn-tennis grounds and thirteen cricket pitches in the park.

18. The necessary expenses of maintaining the park as a whole, with the buildings on it, for the purposes of the Act, far exceed any sums of money which are or could be derived from licences for the supply of refreshments, or for grazing rights, or otherwise. The actual expenses exceed 2000*l.* a year.

19. If the hereditaments assessed in the rate had remained in the same state of use and occupation in which they were prior to the passing of the Act, the rateable value thereof would have been sufficient to support the figures set out in the rate.

20. The total purchase-money paid for the park in 1891 was 117,000*l.*, of which 62,000*l.* only was provided by the appellants, the balance being made up of contributions from other public bodies.

21. If the appellants had had a duty to provide an open space for the public in the locality, and, for the purpose of carrying out that duty, had had the power and the wish, instead of purchasing the park, to take it as lessees or tenants, and pay a rent for the same, they would have had to pay a rent for the same sufficient to support the figures in the rate.

22. The respondents contend that the facts as above stated shew an occupation of all or some of the hereditaments by the

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appellants, and that such occupation was, under the circumstances above stated, a beneficial occupation, and that, even if the occupation of the appellants was in fact not beneficial to them, yet they were properly rated to the relief of the poor in sums justifying the respective rates.

23. The appellants contend that, under the circumstances, they are not rateable at all for any portion of the property, or that, if rateable, the rateable value is nil.

The questions for the opinion of the Court are—

(1.) Whether the appellants are rateable in respect of all or any, and, if any, which portion of the hereditaments.

(2.) If the appellants are rateable, whether they are rateable at a nominal amount only in respect of all, or any, and, if any, what portion of the hereditaments.

If the Court should be of opinion that the appellants are rateable for the whole of the hereditaments upon the same basis as their predecessors, the late occupiers thereof, then the rate is to stand.

If the Court should be of opinion that the appellants are rateable for the whole of the hereditaments upon the basis that the rateable value depends on what they would have to pay by way of rent, if they had rented the hereditaments instead of purchasing them, then also the rate is to stand.

If the Court should be of opinion that the last preceding supposition is incorrect, but that nevertheless the appellants are rateable for the hereditaments, taken separately, on the basis of there being, notwithstanding the Act of Parliament, a beneficial occupation of, (*a*) the hereditaments formerly comprised in the old mansion-house, numbered 1473, (*b*) the land numbered 1475, (*c*) the lodge numbered 1483, or (*d*) the cottage numbered 1487, then the rate is, for the purposes only of this case, to be amended, by changing the rateable value of (*a*) from 154*l.* to 77*l.*, of (*b*) from 171*l.* to 85*l.*, of (*c*) from 10*l.* to 5*l.*, of (*d*) from 24*l.* to 12*l.*, respectively, with corresponding reductions in each case of the gross estimated rentals.

If the Court shall be of opinion that all the hereditaments, or any portion or portions thereof, are, either not rateable, or rateable at nil, then the rate is to be quashed, or quashed pro tanto, as the case may be.

If the Court should be of opinion that none of the above contentions or bases are right, the rate is to be amended in accordance with the judgment of the Court, whatever it may be.

June 13; July 29. *Bosanquet, Q.C.* (*Avory* with him), for the appellants. On the facts stated in the case there is no beneficial occupation of these premises, or of any part of them, and therefore no rateable value, and the appellants, the county council, are not liable to be rated. The county council cannot let, or dispose of, any part of the land, for s. 9 of the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), which gives power to let certain other premises, does not apply to this land. The existence of bye-law No. 1, set out in paragraph 15 of the case, by which the public are excluded from the park at night, and which is expressly found, in paragraph 14, to be necessary for the protection of the park, makes it impossible to let the house. The decision in *Hare* v. *Overseers of Putney* (1) turned on the fact that the bridge had been dedicated to the public, and the Metropolitan Board of Works could make nothing out of it, but were burdened with the obligation to keep it up. So here the park is dedicated to the public, and the only occupation of the county council is a burdensome occupation, for the case finds (in paragraph 18) that the expenses far exceed the receipts. The other decisions are also in favour of the view that the county council are not liable to any rate in respect of such an occupation: *Reg.* v. *School Board for London* (2); *London County Council* v. *Churchwardens, &c., of Erith* (3); *Duke of Buccleuch* v. *Metropolitan Board of Works* (4); *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks* (5); *West Bromwich School Board* v. *Overseers of West Bromwich* (6); *Corporation of Lincoln* v. *Overseers of Holmes Common* (7); *Overseers of Putney* v. *London and South Western Ry. Co.* (8)

Lawson Walton, Q.C. (*Lewis Coward* with him), for the respondents. The decisions shew that a public body, occupying

(1) 7 Q. B. D. 223.
(2) 17 Q. B. D. 738.
(3) [1893] A. C. 562.
(4) L. R. 5 H. L. 418.
(5) 11 H. L. C. 443.
(6) 13 Q. B. D. 929.
(7) L. R. 2 Q. B. 482.
(8) [1891] 1 Q. B. 182, 440.

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under such circumstances as the present, are to be treated as the hypothetical tenant for the purpose of assessment, and are liable to be rated.

Cur. adv. vult.

August 8. The written judgment of the Court (Pollock B. and Wright J.) was delivered by

WRIGHT J. There are no absolute exemptions from rateability, except (1.) express statutory exemptions, and (2.) the exemption incident to the appropriation of the land to purposes of public government. With these exceptions, all land is rateable, if its occupation is or can be beneficial, even though its purpose is merely fiduciary: see *Jones* v. *Mersey Docks.* (1)

The value may, indeed, be nothing or nominal after payment of expenses, and even where there might, in fact, be some value the statutory test—namely, what it is worth to let by the year—may sometimes preclude assessment. Formerly, also, it used to be held that there was no beneficial occupation in the case of lands either so used for local public purposes or so appropriated by statute that the hypothetical tenant taking it from the local authority could not hope to make any profit out of the land in the actual circumstances, and consequently (as was thought) there could not be found any tenant who would give any rent at all. So long as this view prevailed, many lands and works, the actual occupation of which was obviously beneficial and valuable, though not productive of direct pecuniary profit, escaped assessment. But it is now established by the *London School Board Case* (2), the *Burton Case* (3), and finally the *Erith Case* (4), that the local authority itself must in general be taken into account, as a possible tenant, to whom the occupation may be beneficial, even if not profitable, and who may satisfy the statutory test, because it might be worth while to pay a rent for what is necessary or beneficial to have, without reference to pecuniary profit

(1) 11 H. L. C. 443, 502, per Lord Westbury.

(2) *Reg.* v. *School Board for London*, 17 Q. B. D. 738.

(3) *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent*, 24 Q. B. D. 197.

(4) *London County Council* v. *Churchwardens, &c., of Erith*, [1893] A. C. 562.

or loss from the occupation of the particular land, and the possession of which avoids the necessity or occasion for expenditure for the provision of other and perhaps more costly works. In such cases an upper limit of the beneficial value to the local authority is necessarily the cost or rent at which it could provide or obtain a lease of similar works or lands. That cost or rent is not the absolute measure—one reason being that such a rent might more than represent the cost of purchasing or constructing new works, or the cost might more than represent the rent—nor probably in practice would the assessment very closely approximate to either limit; but either may be an important element in the valuation.

There are, indeed, some cases in which even the application of this doctrine will not result in any assessable value. Such would be the case of a bridge which has become dedicated to the public free of toll. In such a case a local authority, owning and occupying the bridge, may have no beneficial occupation at all quâ occupier. The only benefit which any one derives, or can derive, is not a benefit from the occupation, but a benefit as a member of the general public from the dedication, and the local authority, considered as a possible tenant, could not find it advantageous to give any rent in order to occupy the bridge, and would not be assessable.

But such cases are probably rare, and in most cases of local public works a benefit is derived from the occupation and is assessable.

The only respect in which the present case differs from the *School Board Case* (1) or the *Burton Case* (2) seems to be that in those cases the authority was under an obligation to provide the same or similar accommodation or work, and therefore must almost necessarily find it worth while to pay something for the existing accommodation or work rather than provide a substitute, whereas in the present case the county council are not bound to provide parks. It seems, however, to be obvious that even so the occupation of the park may be beneficial, although not so

(1) *Reg.* v. *School Board for London*, 17 Q. B. D. 738.

(2) *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent*, 24 Q. B. D. 197.

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Wright J.

necessarily beneficial as it would be if some park were obligatory. The park is provided, and is presumably valuable, for purposes of health and recreation, to the inhabitants of the locality, for whom their representatives, the county council, with the assent of parliament, have thought proper to provide it, and almost certainly there must be some rent which the county council would be willing to give rather than forego this park or provide another. The result, therefore, is the same as if they were bound to provide one, except that it is or may be less easy to determine what rent they would be willing or would find it worth their while to give.

The appeal therefore fails in substance, and it remains only to determine what is the proper basis of assessment. We think that none of the suggestions contained in the 23rd paragraph of the case can be regarded as absolutely correct, and we can only remit the case to find what is the beneficial value, subject to the following limitations:—

No regard ought to be had to the former valuations or assessments made before the park existed as such. The actual cost of acquiring the site and laying out this or a similar park, or the interest on such cost, appear not to be relevant, unless in so far as they may tend to shew that the council might be willing to pay a rent representing that cost, or, at any rate, a substantial rent, rather than have no park. The rent which they would have to pay for such a park is no criterion, because for many reasons that rent may be more than the possible or actual beneficial value. The valuation ought not, however, in any case to exceed such rent.

Lastly, we think that the different parts of the property ought not to be separately assessed. They are occupied as a whole for one purpose, and could not be separately let without interfering with that purpose.

Case remitted.

Solicitor for appellants: *W. A. Blaxland.*

Solicitor for respondents: *William Honey.*

P. B. H.

In re FOLLOWS.
Ex parte FOLLOWS.

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Aug. 5.

Bankruptcy — Act of Bankruptcy — Bankruptcy Notice — Interpleader — Creditor not entitled to issue Execution — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

Where goods taken in execution under a judgment have been claimed by a third party before the sheriff has made a return, and an interpleader summons has been taken out, and is pending, the judgment creditor is not in a position to issue execution for the amount of the judgment debt, and therefore is not entitled to serve a bankruptcy notice on the judgment debtor.

APPEAL by the debtor from a receiving order made in the county court at Birmingham.

The act of bankruptcy alleged was failure to comply with the requirements of a bankruptcy notice.

The material facts and dates were as follows:—

On March 23 judgment was obtained against the debtor for the sum of 89*l.* 10*s.* 4*d.* On March 27 a writ of fieri facias was placed in the hands of the sheriff, who some days later levied and sold. The amount realized at the sale was 42*l.* 2*s.* 3*d.* gross, and 29*l.* 6*s.* 9*d.* net. On April 22 a bankruptcy notice was issued. A claim having been made to the goods by a third party, an interpleader summons was taken out on April 27. On April 29 the bankruptcy notice was served on the debtor. On April 30 an interpleader order was made. On June 19 judgment was given in the county court in favour of the judgment creditor in the interpleader proceedings, and an appeal from that judgment to the Queen's Bench Division was pending at the time of the hearing of the present appeal. No return had been made to the writ of fieri facias.

The material parts of the clause in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*g*), on which the decision turned, are set out in the judgment of Vaughan Williams J.

Hansell, for the debtor, in support of the appeal. The receiving order was wrongly made, for at the date of the service of the

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bankruptcy notice no act of bankruptcy had been committed by the debtor, inasmuch as the judgment creditor was not then in a position to issue execution for the amount of the debt, and was not entitled to serve a bankruptcy notice on the debtor: *Ex parte Ford, In re Ford* (1); *In re Phillips, Ex parte Phillips.* (2) The interpleader summons operated as a stay of execution, within the meaning of s. 4, sub-s. 1 (*g*). No return having been made to the writ of fieri facias, the creditor was not entitled to issue a second execution. In *Chapman* v. *Bowlby* (3) Parke B. said: "The law on this subject is clear. If a writ of fieri facias issues, under which anything is levied, that writ must be returned, and any subsequent process must issue for the whole sum due, minus the amount that has been so recovered, and must recite the first writ." (4) All the decisions shew that this is the correct view of the law. In *In re Phillips, Ex parte Phillips* (2), Cave J. said: "It would, in my opinion, be very unjust that a creditor could issue a fi. fa., and, at the same time, a bankruptcy notice, on failure to comply with the terms of which the debtor commits an act of bankruptcy. It has been said that the goods seized may turn out not to be the goods of the debtor, and no wrong may, therefore, be done to him. That may be so. But until the creditor directs the sheriff to withdraw, or the claim is decided against him, and so long as he insists on his execution, he still has it, and is estopped from saying that he has not." (5) Moreover the bankruptcy notice, having been issued after the sale under the execution, was wrong in claiming too much. Credit should have been given for the amount realized. This is not a mere formal defect, and could not be amended.

Muir Mackenzie, for the respondent. There is nothing in what has taken place which can amount to a stay of execution, within the meaning of the Act. The execution creditor, therefore, was entitled to serve the bankruptcy notice on the debtor, and the receiving order was rightly made.

[The following authorities were also referred to in the course of the argument: *Morland* v. *Pellatt* (6); *In re Bates, Ex parte*

(1) 18 Q. B. D. 369.
(2) 5 Morrell, 40.
(3) 8 M. & W. 249.
(4) 8 M. & W. at p. 251.
(5) 5 Morrell, at p. 43.
(6) 8 B. & C. 722.

Lindsey (1); *In re Child, Ex parte Child* (2); *In re Miller, Ex parte Miller*. (3)]

[VAUGHAN WILLIAMS J. referred to *In re Connan, Ex parte Hyde*. (4)]

Hansell was not heard in reply.

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VAUGHAN WILLIAMS J. One ground which was relied on in support of this appeal was, that no act of bankruptcy had been committed. The act of bankruptcy alleged was non-compliance with a bankruptcy notice, which had been served on the appellant under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*g*). By the terms of that section, "A debtor commits an act of bankruptcy . . . (*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." The facts, so far as material, are as follows. A judgment having been obtained by the petitioning creditor against the appellant for 89*l*. 10*s*. 4*d*. in respect of rent, a writ of fieri facias was placed in the hands of the sheriff, who effected a levy, which was followed by a sale. A claim was made to the goods by a third party. The exact date of this claim is left uncertain, but I think the reasonable inference is that the reason why the sheriff did not immediately make a return, and pay over the money to the execution creditor, was because this claim had been made. On April 22 a bankruptcy notice was issued against the appellant; on April 27 an interpleader summons was taken out; on April 29 the bankruptcy notice was served; on April 30 an interpleader order was made. It follows

(1) 4 Morrell, 192.
(2) [1892] 2 Q. B. 77.
(3) 10 Morrell, 183.
(4) 20 Q. B. D. 690.

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from the dates that, on April 22, the date of the issue of the bankruptcy notice, the fieri facias had been placed in the hands of the sheriff, and the levy had been made, but there had been no return. The date of the service of the bankruptcy notice was April 29, which was after the issuing of the interpleader summons. It follows that at the date of the issuing of the bankruptcy notice, and at the date of the service of the bankruptcy notice, the execution creditor was not in a position to issue execution for 89*l.* 10*s.* 4*d.*, the whole amount of the judgment debt. The old rule at common law was that a second writ of fieri facias could only issue if the return to the first writ of fieri facias had already been made. At the date of the service of the bankruptcy notice in the present case, the execution creditor was also unable to issue execution for the whole amount of the judgment debt, for the same reason which would have prevented him from doing so at the date of the issue of the bankruptcy notice—that is, because there had been no return, and also because, at the date of the service, there was an interpleader summons pending. In my opinion, the fact that the interpleader summons had been issued brings the case within the decisions in *Ex parte Ford, In re Ford* (1), and *In re Phillips, Ex parte Phillips.* (2) If this view is correct, the bankruptcy notice in the present case, which gives the judgment debtor notice to pay the whole amount of the judgment debt, is for that reason bad. I do not rely on any right to a stay of execution, but on the plain intention of the Act of Parliament, that a bankruptcy notice shall only demand payment of that which the judgment creditor can enforce payment of. If the amount of the debt had been paid, the judgment creditor would have ceased to have a right to issue execution. In the present case it is sufficient to say that, at the date of the issue of the bankruptcy notice, and at the date of its service, the judgment creditor had no right to issue execution for anything but the balance of the judgment debt which remained due. A question might be raised as to the right of amendment. As to this, I think that, if the view expressed by Mathew J. in *In re Bates, Ex parte Lindsey* (3), is to be adopted, there would be a

(1) 18 Q. B. D. 369.

(2) 5 Morrell, 40.

(3) 4 Morrell, 192.

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In re Follows. *Ex parte* Follows.

Vaughan Williams J.

strong case for an amendment. But this question does not now arise, because Mr. Muir Mackenzie declined to ask for an amendment of the bankruptcy notice. The question therefore is, can a bankruptcy notice issue for a sum of money for which execution cannot issue? I will not go through all the cases in which this question has been raised, but it is enough to say that it has been decided that it cannot. The only question remaining is, could execution have issued in the present case for the whole amount of the judgment debt? It is clear that it could not, for the execution creditor would have been bound to deduct the sum of 29*l.* 6*s.* 9*d.*, at least, from the full amount.

For these reasons I am of opinion that the bankruptcy notice was wrongly issued, and the receiving order must be set aside.

Wright J. I am of the same opinion. I give no opinion on the question whether a bankruptcy notice can issue where execution has been levied, but has not been perfected by a return.

Appeal allowed.
Leave to appeal granted.

Solicitor for appellant: *Ralph Raphael, for Blackham & Taylor, Birmingham.*

Solicitor for respondent: *R. White, for W. S. Tunbridge, Redditch.*

P. B. H.

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May 22;
Aug. 3.

ATTORNEY-GENERAL *v.* LORD SUDELEY AND OTHERS.

Revenue—Probate Duty—Foreign Mortgage.

A husband died domiciled in England. By his will, after bequeathing various specific legacies, he devised and bequeathed one-fourth of the residue of his real and personal estate to his wife. His will was proved in England; and while his estate was being administered there, and before the amount of the clear residue had been ascertained, the wife died. The husband's estate included money invested on mortgages of real property in New Zealand. These mortgages remained unrealized at the date of his wife's death, and no part of them had been appropriated to any particular shares of the ultimate residue. The executors of the wife, in their affidavit made for the purpose of obtaining probate of her will, did not include her fourth share of the said mortgage securities, and refused to do so, claiming that it was not liable to probate duty in this country:—

Held, that the wife's share of the mortgage securities was a foreign asset, and was rightly excluded from the affidavit.

INFORMATION by the Attorney-General against the executors of Frances Louisa Tollemache, deceased, claiming that a sum of 111,850*l.* 15*s.* 7*d.*, part of the personal estate of the said F. L. Tollemache, was liable to probate duty. Algernon Gray Tollemache by his will, after bequeathing various specific legacies, devised and bequeathed the residue of his real and personal estate to trustees to pay the income thereof to his wife Frances Louisa Tollemache for her life; and by a codicil he gave one-fourth of the entire residue to his said wife absolutely. A. G. Tollemache died on January 16, 1892, domiciled in England, and his will was duly proved in England. At the time of his death he was possessed of personal estate exceeding in value 1,250,000*l.*, including large sums invested on mortgages of real estate in New Zealand. While the estate under his will was in course of being administered, and before the amount of the clear residue had been ascertained, his wife, F. L. Tollemache, died on April 15, 1893, having by her will appointed the defendants her executors, who duly proved her will in England. At the date of her death the said New Zealand mortgage securities remained unrealized, and no portion of them had been appropriated to any particular shares of the ultimate residue. In the affidavit made for the

purpose of obtaining probate of her will, the defendants included her fourth share of the personal estate of her deceased husband exclusive of the New Zealand mortgages; but they did not include, and claimed to exclude, in computing the value of such fourth share, the whole of such mortgage securities. The estimated net value of such mortgage securities at the time of her death was 447,403*l.* 2*s.* 5*d.*, her fourth share of which was 111,850*l.* 15*s.* 7*d.* The Crown claimed that this sum ought to be included as part of the estate of F. L. Tollemache liable to probate duty.

Sir R. T. Reid, *A.-G.*, and *Vaughan Hawkins*, for the Crown. It is conceded that the executors of A. G. Tollemache, the husband, were entitled to exclude the New Zealand mortgages from their probate duty account; but the executors of the wife are in a different position. They have no title to the mortgages themselves or to any specific portion of them. Their only right in respect of them is a right as against the executors of the husband to have the husband's estate administered. Whether this right is an English or a foreign asset depends upon the place where the husband was domiciled, and where his will was proved and is being administered, and not on the place where the assets in question were situated. In *In the Goods of Ewing* (1) a testator died domiciled in Scotland, leaving personal property, some of which was situate in England. His will was, under the provisions of 21 & 22 Vict. c. 56, which enables the executors of a person dying domiciled in Scotland to include in the inventory of his effects all his property wherever situate within the United Kingdom, proved only in Scotland, and while it was being administered there one of his legatees died. Sir James Hannen held that the claim of such legatee's executors was a Scottish and not an English asset, being a claim against the testator's executors to have his will duly administered in Scotland. Therefore, in the present case, as A. G. Tollemache's will was proved and is being administered in England, the claim of his wife's executors against his estate is an English asset, notwithstanding that part of the estate is

(1) 6 P. D. 19.

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situate abroad. Where a testator is entitled to a share of property it is immaterial for the purposes of taxation that a part of that of which he is so entitled to a share is situate abroad, for a share is an entire thing and taxable as such: *Forbes* v. *Steven.* (1)

Channell, Q.C., and *Bremner*, for the defendants. Liability to probate duty is limited to that part of the property to be administered which is situate within the jurisdiction at the time of the testator's death: Williams on Executors, 8th ed. Part I. p. 624; *Attorney-General* v. *Hope.* (2) Even where there is an agreement made by a testator to convert foreign property into English, such as India Stock into English Stock, if it is unconverted at the time of his death probate duty is not payable on it: *Pearse* v. *Pearse.* (3) But if so, then, as the New Zealand mortgages remained unconverted at the time of the widow's death, probate duty is not payable on her share of them. The claim of her executors against the executors of her husband is not an English asset, for the money is not recoverable in this country. Any action brought by her executors against her husband's executors would only be productive of an account of the property; it would not result in a recovery of the property itself. In order to recover the property itself, the husband's executors must take the necessary proceedings in New Zealand.

Vaughan Hawkins, in reply.

Cur. adv. vult.

Aug. 3. The judgment of the Court (Lord Russell of Killowen C.J. and Charles J.) was read by

LORD RUSSELL of KILLOWEN C.J. This information sought to charge the executors of Frances Louisa Tollemache with duty upon certain property in New Zealand, which had been bequeathed to her as part of the residuary estate of Algernon Gray Tollemache, her husband. He died on January 16, 1892, domiciled in England, and at the time of his death he possessed a large personal estate, including sums amounting to upwards of 400,000*l.* invested on mortgages of real estate in New Zealand.

(1) L. R. 10 Eq. 178. (2) 2 Cl. & F. 84.
(3) 9 Sim. 430.

By his will, dated January 31, 1874, after bequeathing various specific legacies to his wife, Frances Louisa Tollemache, and to others, he devised and bequeathed the residue of his real and personal estate to trustees upon trust to distribute it as provided in the will, and in six codicils thereto subsequently executed; and at the time of his death his wife became absolutely entitled by virtue of these testamentary dispositions to one-fourth of the residue.

The executors and trustees of A. G. Tollemache proceeded to administer his personal estate, and paid probate duty upon it, excluding therefrom the personal property in New Zealand. Before the residue had been distributed, and whilst the estate was in course of being administered, Frances Louisa Tollemache died, leaving the defendants to this information her executors, and bequeathing to them her personal estate upon trust for sale and conversion. The defendants proved her will in May, 1893. They included as part of her estate the fourth share of the residue of A. G. Tollemache's estate, exclusive of the New Zealand mortgages, which they claimed to leave entirely out of account. The estimated value of Mrs. Tollemache's fourth share of the New Zealand property was upwards of 111,000*l.*, and it was upon this sum that the Crown now sought to recover duty. Whilst admitting that the executors of A. G. Tollemache had rightly excluded the New Zealand property from their return, it was contended that the share of Frances Louisa Tollemache in the whole of the personal estate of A. G. Tollemache (including the money invested in New Zealand mortgages) was an "asset" of her estate recoverable by her executors in England virtute officii, and that they ought therefore to take probate of that asset here, and pay duty on the full value thereof, notwithstanding that some of the assets of A. G. Tollemache (those already mentioned) were not locally situate in this country.

The claim of the Crown was mainly rested upon the authority of the case of *In the Goods of Ewing*. (1) There William Ewing died possessed of property of small value in England, and entitled under the will of John Orr Ewing to large assets in Scotland, which were being duly administered in that country

(1) 6 P. D. 19.

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by his executors, who had availed themselves of the provisions of 21 & 22 Vict. c. 56, which enables the executors of a domiciled Scotsman to include in the inventory of his effects all his property wherever situate in the United Kingdom. The will of William Ewing was proved in Scotland only. A legatee under the will having applied in England for a grant of administration of William Ewing's estate in England, the Court declined to accede to the application on the ground that the grant was unnecessary, it not having been shewn that the executors were not doing their duty. It will thus be seen, that in expressing the opinion presently mentioned the President (Sir James Hannen) was not pronouncing judgment on a point which it was necessary to decide. He says: "The main ground on which this application has been based is that the claim of the estate of William Ewing on the estate of his uncle, John Orr Ewing, is an asset of William Ewing's estate in England by reason of some of the assets of the uncle's estate having been in England at the time of the death of W. Ewing, and, therefore, that the executors of W. Ewing's will ought to take probate in respect of these assets here. It is not disputed that the deceased, John Orr Ewing, was a domiciled Scotchman, and that his will was properly proved in Scotland, and is being administered there in accordance with Scotch law. The claim of the executors of William Ewing in respect of the interest of their testator under his uncle's will is a claim on the executors of the uncle duly to administer his estate and to pay the legacy to William Ewing out of the funds which may be applicable to that purpose. It cannot be disputed that this claim or interest in the estate of the uncle constitutes an asset of the estate of the deceased W. Ewing, because it is recoverable by the executors of W. Ewing virtute officii; but it appears to me that it is an asset in Scotland, and not in England. . . . . I am not aware that the point has been the subject of judicial determination; but all analogies seem to lead to the conclusion that Scotland is the local situation of this asset of W. Ewing. Thus the share of a deceased partner in a partnership asset is situate where the business is carried on (Hanson on Probate Acts, p. 161), and shares in a company are locally situate where the head office is: *Attorney-General* v.

Higgins. (1) And the fact that some of the assets of John Orr Ewing were situate in England does not appear to make any difference. If I were to constitute the applicant administrator with the will annexed of W. Ewing, he could not in that character take possession of or recover the outstanding assets of the uncle's estate, he could not claim those assets themselves virtute officii; his only remedy would still be through and by means of his claim upon the executors of the uncle to have his estate duly administered." (2)

Now, applying these dicta to the present case, it was on the part of the Crown submitted that they established the proposition contended for by the Crown. A. G. Tollemache's executors were, it was said, in the same position towards Frances Louisa Tollemache's executors as was occupied by John Orr Ewing's executors towards William Ewing's executors, and just as in *In the Goods of Ewing* (3) William Ewing's executors' asset was the right to sue for his legacy in Scotland; so here the asset of Frances L. Tollemache's executors was the right to sue the executors of A. G. Tollemache in England. With great respect for any dictum of that very learned judge (Sir James Hannen), we cannot accept this as a correct statement of the law. Moreover, that case differs in one material particular from the present. In Ewing's case the executors of William Ewing could not only have sued the executors of John Orr Ewing for his share, but could have recovered it without any further probate (21 & 22 Vict. c. 56). In the present case, it is true that the executors of Frances Louisa Tollemache could claim an account in an action here against the executors of A. G. Tollemache; but they could not recover her share of the New Zealand estate without recourse being had on their behalf by the executors of A. G. Tollemache to the Courts of New Zealand to clothe themselves with the legal title to the residuary estate which it was their duty to distribute. The New Zealand estate remained a foreign asset in the hands of the executors of A. G. Tollemache, as trustees for the executors of Frances L. Tollemache, as to her share in it, and at the time of her death it was not within the jurisdiction of the English Court. Her executors could not have

(1) 2 H. & N. 339. (2) 6 P. D. 19, at pp. 22, 23, 24. (3) 6 P. D. 19.

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recovered it here virtute officii; it was no portion of her estate in England; and the general rule of law appears to us to be applicable by which the amount of probate duty is to be regulated, not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the will or letters of administration, but by the value of such part as is at the death of the deceased within the jurisdiction of the Court by which the probate is granted: Williams on Executors, 9th ed. vol. i. p. 542. The reason of the rule is that probate duty only attaches on assets within the jurisdiction of the Ordinary at the time of the testator's death which he would formerly have had himself to administer in case of intestacy; and which must, therefore, be so situated that he could have disposed of them in pios usus: Williams on Executors, supra. Thus it has been held that no probate duty is payable upon the produce of the sale of French Rentes standing in the testator's name at the time of his death, although afterwards brought to England and received by the executor: *Attorney-General* v. *Dimond.* (1) It was pointed out in the judgment of the Court of Exchequer in that case that probate could not have been granted in respect of these Rentes, because at the time of the death of the testator they were in a foreign country, and consequently out of the jurisdiction of the Spiritual Court; and the distinction was drawn between the liability to probate duty and to legacy duty, and it was pointed out that it is not the administration of assets which renders probate duty payable, but the local situation of the assets at the testator's death. In *Attorney-General* v. *Hope* (2) the same principle was applied to United States stocks, the Lord Chancellor stating, in the course of his judgment, that he had made inquiries "of very learned parties, two very competent authorities, one, the learned Judge of the Prerogative Court, and the other the King's Advocate," and that they both confirmed the view he took of the Ordinary's office—a view which limited the Ordinary's jurisdiction to goods of a deceased person within the diocese at the time of the death. Facts similar to those in the present case, raising the same points or similar points, must have been of frequent occurrence; and the absence

(1) 1 C. & J. 356. (2) 2 Cl. & F. 84.

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of any authority, except the dictum referred to, tells strongly against the present contention of the Crown, for there is no ground for saying that duty has been usually paid here in such circumstances as the present.

We are, therefore, of opinion that the share of Frances L. Tollemache in the mortgage securities in New Zealand is *not* an asset of her estate in England, and that her executors are not compellable to take probate in respect thereof. They have, it may be observed, already paid administration duty on the estimated value of the share in the colony, where it is locally situate. The mere right to sue the executors of A. G. Tollemache in this country for an account and for payment of the share does not, in our judgment, alter the character of the asset. It remains a foreign asset, of which the executors could not possess themselves without the intervention of the Colonial Court.

Our judgment, for these reasons, is for the defendants with costs.

Judgment for the defendants.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *J. A. Bertram.*

J. F. C.

C. A.
1895
Aug. 9.

[IN THE COURT OF APPEAL.]

In re STOGDON.
Ex parte LEIGH.

Bankruptcy — Bankruptcy Notice — Address of Creditor — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules*, 1886, *r.* 136; *Appendix*, *Part I.*, *Form No.* 6.

A bankruptcy notice stated the address of the creditor who issued it to be "White's Club, St. James', S.W." The creditor did not reside at the club, and he was in fact out of England during the whole of the seven days limited by the notice for the payment of the debt. There was evidence that, if the debtor had gone to the club, he would have been referred to the creditor's London solicitor, who held a general power of attorney for the creditor, and could have received payment of the debt on his behalf:—

Held, that an address at which the creditor could not be found, but could only be heard of, so that the debtor could not pay the debt there, was not such an address as was required by the Bankruptcy Act and Rules; that the notice was consequently invalid, and that the non-payment of the debt within the seven days did not constitute an act of bankruptcy.

Appeal by R. C. Leigh, a creditor, against the dismissal by one of the Bankruptcy Registrars of a bankruptcy petition presented by the appellant against J. C. Stogdon.

The act of bankruptcy relied upon was the non-compliance by the debtor with a bankruptcy notice which the appellant had served upon him. The notice was in the form No. 6 in Part I. of the Appendix to the Bankruptcy Rules, 1886. It required the debtor within seven days after service of the notice on him to pay "to R. C. Leigh, of White's Club, St. James', S.W., the sum of 2525*l.* 6*s.* 10*d.*, claimed by him as being the amount due on a final judgment obtained by him against you in the High Court of Justice, Queen's Bench Division, dated the 12th of June, 1895, whereon execution has not been stayed, &c."

The creditor did not reside at the club, and it was admitted that he was in fact out of England during the whole of the seven days limited by the notice for payment of the debt.

There was an affidavit by the creditor that he had given a general power of attorney to his solicitor to act for him during his absence, and that the debtor knew of this power. No mention, however, was made of this power in the bankruptcy notice. The creditor also deposed that, if the debtor had gone to White's Club, he would have been referred to the creditor's London solicitor, who would have accepted payment from the debtor for the creditor. There was no evidence that the debtor had gone to the club.

Cooper Willis, Q.C., for the creditor. The bankruptcy notice is in the form prescribed by the rules. No other address in England could have been given by the creditor. It could not be his duty to remain at the club during the whole of the seven days to receive payment of the debt, in case the debtor should choose to tender it. The debtor knew that the creditor was travelling on the Continent, and that he had given a general power of attorney to his solicitor, and if he had wished to pay the debt he could easily have done so. There is no evidence that he went to the club to inquire. The prescribed form of bankruptcy notice requires the debtor to pay the debt to the creditor, but it does not say where it is to be paid. It is sufficient to give a true address; it is not necessary that it should be the address at which it is intended that payment of the debt should be made. Suppose a creditor gave the address at which he was actually residing on the day on which he issued the bankruptcy notice, and then the next day he removed to another address; could it be said that in such a case he had not given a proper address? Is the creditor bound not to change his residence during the seven days? *Lambe* v. *Smythe*. (1)

Herbert Reed, Q.C., and *Frank Mellor*, for the debtor, were not called upon.

LORD ESHER M.R. In my opinion regard must be had to the substance and meaning of the Bankruptcy Act and Rules, and not merely to the words. Unless the requirements of the Act and Rules are complied with in substance, they are not complied

(1) 15 M. & W. 433.

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with at all. Here I think the creditor gave no address such as is required by the Act and the Rules. None of the things which the debtor is required by the bankruptcy notice to do could be done by him at White's Club, and therefore his omission to do them did not constitute an act of bankruptcy. The Registrar's decision was right, and the appeal must be dismissed.

KAY L.J. The address given by the creditor was one at which he might be heard of, but at which he was certain not to be found. If the address given is one at which the creditor may be heard of, but at which the debt cannot be paid to him, the provisions of the Act and the Rules are, in my opinion, not complied with. The prescribed form means that the debtor is required to pay the debt to the creditor at an address at which he will be found. Here the creditor was out of England during the whole of the seven days; and I agree with what the Master of the Rolls said during the argument, that under such circumstances it would be monstrous to make a man a bankrupt for the non-payment of a debt.

A. L. SMITH L.J. I agree.

Appeal dismissed.

Solicitors: *Mason & Edwards; C. E. Soames.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1895
June 21.

PAYNE *v.* WILSON.

Sale of Goods—Possession of Goods under Agreement with option to Buy—Hire and Purchase Agreement—Disposition of Goods by Person having option to Purchase—"Person having agreed to buy Goods"—Factors Act, 1889 (52 & 53 *Vict.* c. 45), *s.* 9.

APPEAL of the plaintiff from the judgment of a Divisional Court. (1)

Upon the appeal being called on, counsel for the defendant intimated that in view of the decision of the House of Lords in *Helby* v. *Matthews* (2), which had been given since the decision of the Divisional Court in the present case, he was unable to contest the right of the plaintiff to succeed in this appeal.

Groser, for the plaintiff.

Arthur Hughes (*Jelf, Q.C.*, and *Herbert Smith*, with him), for the defendant.

Appeal allowed.

Solicitor for plaintiff: *H. E. Tudor.*

Solicitors for defendant: *Proudfoot & Chaplin.*

(1) [1895] 1 Q. B. 653. (2) [1895] A. C. 471.

W. J. B.

C. A.
1895
Aug. 9.

[IN THE COURT OF APPEAL.]

THE BRITISH INSULATED WIRE COMPANY, LIMITED *v.* PRESCOT URBAN DISTRICT COUNCIL.

Local Government—Local Authority—Contract—Validity—Specifying Penalty —Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 174, *sub-s.* 2.

An appeal was presented against the decision of the Divisional Court. (1)

Upon the hearing of the appeal it was stated that the Local Government Board would sanction the payment of the arrears due under the contract which the Divisional Court had held to be invalid, and that it had been arranged that a new contract, containing a penalty clause, should be entered into in place of the invalid contract.

Upon these terms,

The Court (Lord Esher M.R. and Kay and A. L. Smith L.JJ.) dismissed the appeal, without delivering any judgments.

Appeal dismissed.

Solicitors for plaintiffs: *Norris, Allens & Chapman, for J. Leslie & Co., Liverpool.*

Solicitors for defendants: *Chester, Mayhew, Broome & Griffithes, for Henry Cross, Prescot.*

(1) Ante, p. 463.

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1895
July 18, 19.

MANCHESTER TRUST *v.* FURNESS.

Ship—Charterparty—Bill of Lading—Proviso that the Master in Signing Bill of Lading shall be the Agent of the Charterer—Liability of Owner—Constructive Notice.

A charterparty contained a proviso that the captain and crew, although appointed and paid by the owners, should be the servants of the charterers, and that in signing bills of lading the captain should only do so as the agent of the charterers, and that the charterers would indemnify the owners against all liabilities arising from the captain signing the bills of lading. The captain signed bills of lading in the ordinary form for goods to be delivered to the holders of the bills of lading, they paying freight and other conditions as per charterparty. The goods were misdelivered, and an action was brought by the holders of the bills of lading against the shipowners for the loss:—

Held, affirming the judgment of Mathew J., (1.) that the special clause in the charterparty was binding only between the owners and the charterers, and did not affect the liability of the owners to the holders of the bills of lading, who were entitled to consider the captain as the agent of the owners; (2.) that the reference to the charterparty in the bills of lading did not give the holders constructive notice of the contents of the charterparty, the equitable doctrine of constructive notice of contents of documents not being applicable to mercantile transactions.

Baumwoll Manufactur v. *Furness* ([1893] A. C. 8) distinguished.

APPEAL from the judgment of Mathew J. in favour of the plaintiffs. (1)

The action in this case was brought against the owners of the steamship *Boston City*, to recover damages for the non-delivery of 2200 tons of coals shipped at Cardiff and deliverable at Rio Janeiro under bills of lading signed by the master of the ship. The defendants denied liability, on the ground that the bills of lading had been signed by the master, not as their agent, but as the agent of the charterers of the ship, Messrs. Benchimol & Sobrinho.

The charterparty, which was dated April 7, 1893, was for a period of six months. It was in the ordinary form of a charterparty where the possession of the ship was retained by the owners, but contained some special clauses. It was stipulated

(1) Ante, p. 282.

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that the owners should provide and pay for all the provisions and wages of the captain, officers, engineers, firemen and crew; should insure the vessel, and maintain her in thoroughly efficient state in hull and machinery during the service; that the charterers should pay for the use of the ship 8*s.* per ton monthly, and, in default of such payment, the owners were to have the faculty of withdrawing the ship from the service of the charterers without prejudice to any claim which they might have on the charterers in pursuance of the charter; that the cargo should be discharged at any dock or place that the charterers should direct where the vessel could safely lie afloat; that the whole burden and passenger accommodation (if any) of the ship should be at the charterers' disposal, reserving only proper and efficient space for the ship's officers, crew, tackle, provisions and stores.

The charterparty also contained the following special clause: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under this charter. In signing bills of lading it is expressly agreed that the captain shall only do so as the agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities (if any) that may arise from the captain signing bills of lading, or otherwise complying with the same." It was also stipulated that if the charterers should have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners should, on receiving particulars of their conduct, investigate the same, and, if necessary, make a change in the appointment.

There was also a clause that in the event of loss of time from deficiency of men or stores, the payment of hire should cease until the ship was again in an efficient state to resume her service; and that the ship should not be answerable for any loss or damage arising from stowage, explosions, or bursting of boilers, &c.; and that the owners should have a lien on the cargoes for freight, and the charterers should have a lien on the ship for moneys paid in advance and not earned.

A cargo of coals was shipped by Benchimol & Sobrinho at Cardiff before the end of April, 1893, and the master signed bills of lading in the following form: "Shipped in good order and well conditioned by Cory Brothers & Co. for account of

Messrs. Benchimol & Sobrinho in and upon the good steamship *Boston City*, whereof T. Clark is master, for this present voyage, and bound for Rio de Janeiro . . . . tons of Cory's Merthyr steam coal, which are to be delivered in the like good condition at the aforesaid port of Rio de Janeiro (all and every the dangers, &c., excepted) unto order, or to assigns, he or they paying freight for the same, and other conditions as per charterparty." The ship was not to be answerable for loss through explosions, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull not resulting from want of due diligence by the owners of the ship, or by the ship's husband or manager. There were no special words shewing whose agent the master was in signing the bills of lading. The owners of the ship gave the master a copy of the charterparty with directions to carry it into effect.

The bills of lading were delivered by the master to the charterers, who indorsed them to the plaintiffs, who were bankers at Manchester, to cover an advance of 3217*l.*, and were forwarded by their agents to Rio, with instructions that the coals should be delivered against payment of the advance. The charterers, however, persuaded the master to take the ship to Buenos Ayres instead of Rio, having assured him that the coal belonged to them, and that the bills of lading would be forwarded to that port. On the ship's arrival at Buenos Ayres the representative of the charterers told the master that the bills of lading were in his possession, and the master, without requiring the production of the documents, delivered the coals to the charterers. The coals were sold, and the proceeds received by the charterers, who soon afterwards stopped payment, without repaying the amount due to the plaintiffs.

The plaintiffs accordingly brought this action against the owners of the ship; and Mathew J., by whom the action was tried, held that the special clause in the charterparty did not exonerate the owners from liability, and gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

Sir Walter Phillimore and *H. Holman*, for the defendants. By

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the special clause in the charterparty the charterers were put in the place of the owners, and the master was made their agent, and not the agent of the owners. It was clearly the intention of the parties to relieve the owners from all liability under the bills of lading, and their intention could not have been expressed more plainly: *Baumwoll Manufactur* v. *Furness* (1); *Colvin* v. *Newberry*. (2) The bills of lading contained a proviso referring to the conditions contained in the charterparty, and, therefore, both the master and the holders of the bills of lading had constructive notice of the special stipulations in the charterparty.

Joseph Walton, Q.C., and *Carver*, for the plaintiffs. The real question is whether the relation of master and servant continued to exist between the owners of the ship and the captain: *Baumwoll Manufactur* v. *Furness*. (1) The plaintiffs do not deny that a charterparty may be so drawn as to terminate that relationship and make the captain the servant of the charterer, and that was the ground of the decision in the last-mentioned case. But that is not so here. The captain was appointed and paid by the owners, and could be dismissed by them; and if he had been guilty of negligence in the navigation of the ship they would have been responsible, not the charterers. The effect of the special clause in the charterparty was that, as between the owners and the charterers, the charterers should be responsible for the captain's signature to the bills of lading; but that did not affect the liability of the owners to the consignees of the goods. The reference to the charterparty in the bills of lading was a common form; it only related to such clauses as affect the duties of the captain with respect to the goods, and did not give him or the holder of the bills of lading notice of the special clauses in the charterparty: *Fry* v. *Chartered Mercantile Bank of India* (3); *Serraino* v. *Campbell*. (4)

H. Holman, in reply.

LINDLEY L.J. This is an appeal by the defendants from a decision of Mathew J. in favour of the plaintiffs.

The bill of lading under which the plaintiffs claim is in the

(1) [1893] A. C. 8.
(2) 7 Bing. 190; 1 Cl. & F. 283.
(3) L. R. 1 C. P. 689.
(4) [1891] 1 Q. B. 283.

ordinary form. It is signed by Thomas Clark, master, his principal not being disclosed; it may be the shipowner, or it may be someone else; and the bill of lading is to the effect that the goods shipped are to be delivered to the holder of the bill of lading, "he or they paying freight for the same and other conditions as per charterparty." So there is a distinct reference in the bill of lading to the charterparty to that extent.

The charterparty, which was dated on April 7, 1893, is a time charter, and by it the defendants, who are the owners of the ship *Boston City*, agree to let, and the charterers, who are a Spanish firm of Benchimol & Sobrinho, agree to hire, the steamship for the term of six months. [The Lord Justice then referred to the material clauses in the charterparty which are stated above, and proceeded:—]

Now, upon the true construction of that document, and having regard to the circumstances to which I have alluded, the question arises whether the shipowners are liable for the non-delivery of this cargo by the captain. The story of the trick played upon the captain, and how he fell into the trap which was laid for him, was stated at the bar, and I need not go through it; but the long and the short of it is that having signed bills of lading for delivery of the coal at Rio, he was deceived and misled, and he took the coals to Buenos Ayres, and there they were stolen—that is what it comes to; and the question is now who is to bear the loss. The plaintiffs, who are holders of the bills of lading, rely upon the general rule of law that primâ facie at all events a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner. Of course, in the ordinary course of business that is so; but it may turn out that the master is not the servant or agent of the shipowner, and in the case to which we were referred of *Baumwoll Manufactur* v. *Furness* (1), the charter was such that the master was not the servant of the shipowner, but was the servant of the charterer. The peculiarity of that case was this, that although the charterparty there contained a great many clauses similar to those which we find in the charterparty in this case, the hiring of the master was by the charterer and not by the shipowner. The charterer employed

(1) [1893] A. C. 8.

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him, paid him, dismissed him, and upon the strength of that clause the House of Lords held, affirming the decision of this Court, that the master was in fact the servant of the charterer, and was not in fact the servant of the shipowner. Now it is said that, notwithstanding that case, the peculiar clause to which I have alluded shews that in truth the master here had ceased to be or was not the servant of the owner, but had become the servant of the charterer, and the real question we have to consider is what is the effect of that clause as between the holder of the bill of lading and the shipowner. Let us look first of all at the true construction of the clause as between the shipowner and the charterer. They are the persons who make that bargain, and as between them the captain and crew, although paid by the owners, are to be the agents and servants of the charterers. Then the clause contains an indemnity, which to my mind is extremely significant. It seems as if these parties felt that, notwithstanding this clause, the owners might be held liable for the acts of the master; and they stipulated in that event, notwithstanding the previous bargain that the captain is to be the agent and servant of the charterer—the charterer shall indemnify the shipowner. The view taken by Mathew J. is that that is a stipulation which is valid as between the charterers and the owners, but which does not affect the true position of the captain and the crew, and has no effect at all upon the holder of the bill of lading, although the bill of lading refers in terms to this charterparty. Upon reflection, I am of opinion that that is the true and correct view. I cannot regard all these clauses taken together without coming to the conclusion that the master was, and continued to be in fact, the servant of the owner, subject to a stipulation that as between the owner and the charterers the charterers should treat him as his servant, and indemnify the owners from the consequences of what the captain might do as regards signing bills of lading and so on.

Now, if that is the true view it settles the question. But then we are pressed with the fact that in this case the bill of lading referred to the charterparty, and it is said that the holder of the bill of lading took it with notice of the charterparty, and with notice therefore of this contract, and with notice that the

master was the servant of the charterers. That argument appears to me to be pushing the doctrine of constructive notice a great deal too far. It is quite true that the bill of lading refers to the charterparty to the extent which I have mentioned. The effect of that reference has been considered more than once: it has been considered in *Serraino* v. *Campbell* (1), and also in *Fry* v. *Chartered Mercantile Bank of India* (2), and the effect of the reference is to incorporate so much of the charterparty as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for incorporating more than that. What is wanted in this case is to say that by reason of the reference to the charterparty the holder of the bill of lading and the person who takes it in the ordinary course of business are to be treated as having notice of all the contents of the charterparty. There is no doctrine that goes to anything like that extent; and as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country. That I am not going too far in making these observations will be found by turning to *English and Scottish Mercantile Investment Co.* v. *Brunton* (3), and also to what Lord Herschell said about constructive notice in *London Joint Stock Bank* v. *Simmons.* (4) That case had reference to a notice in respect of debentures, but whether commercial documents are negotiable instruments, or whether they are more or less like them, is a matter to my

(1) [1891] 1 Q. B. 283.
(2) L. R. 1 C. P. 689.
(3) [1892] 2 Q. B. 700.
(4) [1892] A. C. 201.

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mind of very little importance. Lord Herschell said in that case (at p. 221): "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments." He did not pause to inquire there whether those debentures were negotiable instruments or not; but as regards debentures and everything of that kind, and other commercial documents, the protest which I have been making has been made before, and I do not think it is likely to be made in vain.

Having got thus far, we come back to the question, whose servant was the master in signing the bill of lading? The counsel for the appellants have exerted themselves very ingeniously to persuade us, on the strength of the case of *Colvin* v. *Newberry* (1), that we ought to hold he is the servant of the charterer. I do not think we ought. In the first place, the facts of the two cases are totally different. The case of *Colvin* v. *Newberry* (1) was a very curious case. The master there, so far as I understand it, had no principal at all. He was the charterer, and he was the person navigating the ship; he was the master, and he was doing everything on his own account, subject to some payment to the shipowner. But although there is a great difficulty in reconciling all the earlier cases about demises of ships and so on, the test is in each case that which was applied by the House of Lords in the case of the *Baumwoll Manufactur* v. *Furness* (2)—Whose servant is the master? Who is his undisclosed principal when he signs the bill of lading? My answer to that question is, that upon the true construction of these documents he was the servant of the shipowner. The appeal must therefore be dismissed.

LOPES L.J. On consideration, I am clearly of opinion that the learned judge in the Court below was right. The question which we have to decide, and which determines everything, is this: Whose servant was the master when he signed the bill of lading? Was he the servant of the charterers, or of the owners? I have no doubt that, as regards third parties, the master was the servant of the owners. They had hired him; they paid him; they alone could dismiss him. I will illustrate it by a case of

(1) 7 Bing. 190; 1 Cl. & F. 283. (2) [1893] A. C. 8.

this kind. Suppose the *Boston City* had come into collision with another ship through the negligence of the master, could it be said that the owners would not be liable? In my opinion such a contention would be impossible. It is conceded that if there was no such clause as that novel and unusual one to which my brother Lindley has referred, there would be no difficulty in this case. Therefore, the important matter to consider is, what is the true meaning of that clause? Now, in my opinion the meaning of that clause is this—that it protected the owners so far as the charterers are concerned, but it did not protect them against third parties. But then, it is said, in this case a notice was conveyed to the indorsees of the bill of lading for value of what was contained in the charterparty by means of reference to it contained in the bill of lading. The words relied on in the bill of lading are these—"other conditions as per charterparty," and that is all. Now these words, in my judgment, are not sufficient to give notice to the indorsees of a bill of lading for value of any such special provision as the one relied upon in the charterparty. It would require very clear and very explicit words contained in a bill of lading to exonerate the owners from liability to third parties, such as the holders of a bill of lading—to exonerate the owners from the liability attaching to them by the acts of their master. The holders of the bill of lading, in the absence of any such explicit words as I have mentioned, would naturally believe and imagine that the master when he signed the bill of lading was exercising the ordinary authority which attaches to him in his capacity of master.

Now, I think that disposes of the case. I would only wish to add this, that I entirely agree with every word that has been said by my brother Lindley with regard to constructive notice. If I am correct in the view I have taken, it is perfectly clear that the master was the servant of the owners, so far as regards the plaintiffs in this action, and that there was nothing in that clause which relieved them from the liability which in ordinary circumstances would attach to them owing to the act of their master.

RIGBY L.J. I am of the same opinion, and I have very little to add. I think the real question here may be said to be, Have

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the shipowners—by which, of course, I mean the permanent owners, the absolute owners—given up altogether the possession and control of the ship to the charterer? I think it is impossible to read the charter without seeing that they had, in many cases at any rate, reserved to themselves the possession and control through the master—cases that may occur almost at any moment during the whole of this time charter. I will not go through the matters in particular; but, with the exception of the two lines, "the captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under this charter," I do not think there is anything at all in substance that could lead to the conclusion that the possession and control were given up substantially and entirely to the charterers. I quite agree that the clauses that we find here are not to be taken to be conclusive in a case where the master is actually and de facto and for all purposes the agent of the charterer. That was decided in *Baumwoll Manufactur* v. *Furness* (1) in the House of Lords, and it only illustrates the point. Who is the person in control, and in what capacity does he act? With regard to that, I agree with Mr. Carver that the possession and control are entirely reserved, for many important purposes, to the actual shipowners—whether it be for the maintenance of the ship, or withdrawing the steamer from the services of the charterers if they will not make to the master the proper advances, or for the reservation of proper and sufficient space for ship's officers and crew and tackle—which seems to me to have some bearing, because, if the ship were given up entirely with the officers and crew, this reservation would be absurd; the charterers would do just as they pleased in the matter. That is clearly not within their power. All the other clauses about the customary assistance of the ship's crew to be given to the charterers point to a retaining of control through the master for the actual shipowners. Then we have to consider this clause which undoubtedly is an important one: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers, for all purposes whether of navigation or otherwise, under this charter." Can that mean

(1) [1893] A. C. 8.

that for all errors of navigation the shipowners, as between themselves and third parties, shall be free from responsibility? It cannot mean that. I think the fair meaning is: A captain and crew are placed at your disposal, to be under your orders for all purposes where there is not a reservation of the right of the master acting on behalf of the shipowners, and that comes to this, that as regards the liability between the shipowners and the charterers that shall be the state of things. The acts of the officers, the master and others shall be the acts of the charterers as between the shipowners and the charterers themselves. It would be a very strong thing to say that this goes the entire distance of giving up the whole possession and control because we find that clause about indemnity from all consequences and liability, if any. No doubt the words are cautiously put in, because it cannot be supposed there will ordinarily be any such consequences. But still it goes a long way to contradict the idea that the shipowners had no responsibility as between themselves and third parties for the acts of the master.

I will say nothing about the question of constructive notice, because Lindley L.J. has already expressed, in language which I will not weaken by any repetition, my judgment on the question of the introduction into commercial transactions of the doctrine of constructive notice. I will only say that I am satisfied that this would be a very extreme application of the doctrine of equity as regards constructive notice.

Appeal dismissed.

Solicitors: *Addleshaw, Warburton & Trenam, for Addleshaw & Warburton, Manchester; Downing, Holman & Co.*

M. W.

C. A.

1895

July 26.

[IN THE COURT OF APPEAL.]

OWNERS OF CARGO ON SHIP "MAORI KING" *v.* HUGHES.

Ship—Bill of Lading—Warranty—"Seaworthiness"—Fitness of Refrigerating Machinery.

A cargo of frozen meat was shipped on board a steamship at Melbourne, in Australia, for carriage to London. The ship was fitted with refrigerating machinery. The bill of lading was headed "Refrigerator bill." It described the cargo as consisting of 4553 carcases of hard frozen mutton, and stated that they were shipped in apparent good order and condition, and were to be delivered in London in the like good order and condition, subject to the exceptions thereinafter mentioned. The bill of lading contained the following clause: "Steamer shall not be accountable (inter alia) for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation, or other appliances. . . ."

In an action by the shippers against the shipowners for damages for injury to the cargo, by reason of the breaking down of the refrigerating machinery during the voyage:—

Held (affirming the decision of Mathew J.), that the bill of lading contained an implied warranty that the refrigerating machinery was at the time of shipment fit to carry the frozen meat in good condition to Europe, and that the exceptions applied only to what might happen during the voyage, and not to the original fitness of the machinery.

Appeal by the defendants against the judgment of Mathew J., on the trial of a preliminary point of law.

The action was brought by the owners of a cargo of frozen meat, shipped at Melbourne, in Australia, on board the steamship *Maori King* for conveyance to London, against the owners of the ship, claiming damages for the non-delivery or conversion of the goods, or in the alternative for breach of warranty of seaworthiness of the vessel.

The bill of lading was headed "Refrigerator bill." It stated that there were "shipped in apparent good order and condition" on board the vessel "4553 carcases of hard frozen mutton to be delivered (subject to the exceptions and conditions hereinafter

mentioned) in the like good order and condition" in London. The freight was to be at the rate of ½*d.* per pound net weight (as per margin), and to become due on delivery.

The bill of lading contained the following provisions: "Steamer shall not be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation, or other appliances, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners, nor for any other cause whatsoever"; and also "Loss or damage resulting from any of the following causes or perils are excepted, viz., insufficiency in packing or in strength of packages, loss or damage from coaling on the voyage, rust, vermin, breakage, leakage, sweating, evaporation, or decay, injurious effects of other goods, effects of climate or heat of holds, risk of craft, of transshipment, and of storage afloat or on shore, fire on board in hulk, in craft, or on shore, explosion, accidents to or defects in hull, tackle, boilers, or machinery, or their appurtenances, barratry, jettison, neglect, default or error in judgment of the master, mariners, engineers, or others in the service of the owners; collision, stranding, or other perils of the seas, rivers, or navigation of whatever nature or kind and howsoever caused, and accidents, loss, damage, delay, or detention, from any act or default of the Egyptian Government or the administration of the Suez Canal." It was alleged by the plaintiffs that the refrigerating machinery broke down on the voyage, and that the meat was sold at Sydney by the defendants at a great loss.

The ship was fitted with refrigerating machinery.

The statement of claim alleged that it was an implied term in the undertaking contained in the bill of lading that the *Maori King* and the refrigerating machinery therein were at the time of shipment fit to carry the frozen meat to Europe.

The defendants alleged that, in consequence of a breakdown of the refrigerating machinery during the voyage, it became necessary to land the meat at Sydney, and to sell it there

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at once before it became putrid, and the defendants asserted that by the terms of the bill of lading they were exonerated from liability.

An order was made for the trial (before the trial of the issues of fact) of the preliminary question of law, whether the bill of lading contained an implied warranty of the fitness of the refrigerating machinery as alleged by the plaintiffs.

Mathew J. held "that it was an implied term in the undertaking contained in the bill of lading that the ship and the refrigerating machinery therein should be at the time of shipment of the plaintiffs' frozen meat fit to carry the same to Europe, and that the defendants were not relieved from a breach of the undertaking by any of the terms of the bill of lading."

Judgment was accordingly entered for the plaintiffs upon the preliminary question of law.

The defendants appealed.

Moulton, Q.C., *Joseph Walton, Q.C.*, and *James Fox*, for the defendants. The bill of lading contains no express warranty of the fitness of the refrigerating machinery, and none ought to be implied. The ordinary implied warranty of seaworthiness of the ship at the commencement of the voyage does not extend to the fitness of the machinery. The defendants would clearly not have been liable for the loss if there had been no refrigerating machinery on board. Why should they be liable because they have taken elaborate precautions to prevent the decomposition of the cargo? The defendants are protected by the exceptions in the bill of lading. The defendants were bound to exercise due care; but there was no warranty that there was not any latent defect in the machinery: *Steel* v. *State Line Steamship Co.* (1)

[KAY L.J. referred to *Stanton* v. *Richardson* (2); *Manchester Bonded Warehouse Co.* v. *Carr* (3); *Readhead* v. *Midland Ry. Co.* (4)]

Bigham, Q.C., and *Scrutton*, for the plaintiffs. Though there

(1) 3 App. Cas. 72.
(2) L. R. 7 C. P. 421; 9 C. P. 390.
(3) 5 C. P. D. 507.
(4) L. R. 2 Q. B. 412; 4 Q. B. 379.

is in the bill of lading no express warranty of "seaworthiness" or of the fitness of the refrigerating machinery for its purpose at the time of the shipment of the goods, such a warranty necessarily arises by legal implication from the nature of the contract. The heading of the bill of lading—"Refrigerator bill"—and the description of the cargo as "hard frozen mutton" shew that this must be so. The warranty is not only that the ship is fit to encounter the perils of the sea, but that she is fit to bring her cargo to its destination—that the ship which the shipowner offers to the shipper of the goods is fit to carry the specified cargo to the proposed destination. There is necessarily to be implied here a warranty that there is on board the ship refrigerating machinery absolutely fit for its purpose at the commencement of the voyage. This must have been in the contemplation of both parties to the contract. The exceptions do not relieve the shipowner from liability; they apply only to things which may happen during the voyage, and not to the original fitness of the machinery: *Tattersall* v. *National Steamship Co.* (1); *Steel* v. *State Line Steamship Co.* (2)

James Fox, in reply.

LORD ESHER M.R. The question is, whether, under the circumstances which existed at the time when this contract was made—circumstances known to persons who deal with such matters—there is contained in this bill of lading an implied warranty that the refrigerating machinery was at the time of the shipment in a fit condition to carry the frozen meat to Europe—fit, that is, upon an ordinary voyage and under ordinary circumstances. The question is, in other words, whether that condition of the machinery is not promised by the bill of lading to the shipper by the shipowner, because if the promise is absolute, it amounts to a warranty.

Now, the bill of lading is headed "Refrigerator bill," and those words must have some meaning. In my opinion, the necessary meaning of that heading, when you know the circumstances, is, that there is refrigerating machinery on board the ship for the purpose of keeping frozen the meat which is shipped in a frozen

(1) 12 Q. B. D. 297. (2) 3 App. Cas. 72.

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state, for it is described in the bill of lading as "4553 carcases of hard frozen mutton."

An obligation, therefore, is to be implied from the bill of lading to have such machinery on board for the purpose of receiving the frozen meat; and the implication arises in the way in which all implications are made by law, and the only way in which they can be made, namely, that the Court can see that the implied obligation must have been in the contemplation and intention of both parties to the contract.

Now, the shipper who has frozen meat to send to Europe knows that, if no precaution is taken, it will be liable to decompose on the voyage. He therefore must be taken to stipulate (he would be destitute of common sense if he did not) that there shall be on board the ship the known class of machinery which will keep his meat frozen during an ordinary voyage. That is what he wants, and that is what he pays for. He does not pay the ordinary freight; he pays the higher freight which is usual for a ship with such refrigerating machinery. The shipowner, on the other hand, must know perfectly well that the shipper will not put frozen meat on board his ship, and pay him an increased freight for its carriage, unless the shipowner provides him with such machinery as will on an ordinary voyage keep the meat frozen. Therefore both parties must have contemplated, if they thought about it at all, that there should be such machinery on board the ship. If, however, the machinery will not work it is useless: it is the same thing as if there were none. Both parties must, therefore, be taken to have intended that there should be on board such machinery in proper working condition at the time when the ship is to start with the frozen meat. It by no means follows that both parties must have contemplated that, whatever accident might happen, the machinery should continue fit for its purpose during the whole voyage. The shipper, no doubt, would like to have such a stipulation made; but the shipowner would certainly not agree to it. Therefore you have no right to imply so large a contract as that, in the absence of an express stipulation for it. But the original obligation that the machinery shall at the starting of the vessel be fit for the purpose for which it is supplied, and for which

payment is made, is one which the Court can see that as a matter of business both parties must have intended, and, that being so, an agreement to that effect must be inferred or implied in the bill of lading, as it would be in any other document under similar circumstances. And, if you imply a stipulation in the bill of lading, the result is the same as if it were actually written in it. The moment you can by implication insert a stipulation in a written document, it is, though not expressed, as much part of the written document as if it had been actually written in it.

The principle on which a condition or a warranty or any other stipulation is implied will apply to many other contracts; but whether that implication can be made must be determined in each case when it arises. In the present case I have no doubt that, according to the ordinary rules which govern the Court, the stipulation in question is to be implied and therefore to be introduced into the contract. But it applies only to the state of things existing at the commencement of the voyage, and not to anything which may happen after the voyage has begun.

But there are exceptions in this bill of lading just as in every bill of lading which is in the ordinary form; and, if there are in the contract express stipulations which are in terms inconsistent with the primary implication to which I have referred, that stipulation cannot be implied. In that case there would be express stipulations with regard to the condition of the machinery or the ship at starting, and when there are express stipulations as to any matter you cannot imply any others. But the exceptions here are, in my opinion, of the same kind as exceptions in ordinary bills of lading—that is, with regard to matters which may happen during the voyage. They are exceptions from the obligation of the shipowner to deliver the goods at the end of the voyage in the same condition as they were intrusted to him at its commencement. They do not apply to the primary warranty of the condition of the machinery at the time when its application is to begin. I agree, therefore, with my brother Mathew that it was an implied term in this bill of lading that the refrigerating machinery was at the time of shipment fit to carry frozen meat to Europe on an ordinary voyage made under ordinary circumstances. He made use of the term "sea-

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worthiness," but he did not mean the seaworthiness of the ship. He was dealing with the "seaworthiness" of the machinery as distinct from that of the ship. In his judgment the machinery was warranted to be what might be called in nautical phraseology "seaworthy," though it is not strictly an accurate term. But he meant that the machinery was to be at the time of shipment fit as machinery to carry frozen meat to Europe under the ordinary conditions of an ordinary voyage. I have no doubt that the learned judge was right in that respect, and therefore his judgment on the preliminary question of law must be affirmed, and the appeal must be dismissed.

The appeal is against a finding on a preliminary question of law. The order contains a declaration of the rights of the parties, and it is equivalent to a judgment. But it is not a final judgment in the action; it is a preliminary judgment, or, in other words, an interlocutory judgment or order. An appeal lies from it, but it is an interlocutory appeal, and is subject to the conditions imposed on interlocutory appeals. There may be an appeal from this Court to the House of Lords; but as a matter of practice I believe that when such an appeal is presented the learned judge who has tried the preliminary question will not try the issues of fact which arise until after the final determination of the preliminary question by the House of Lords, if the parties choose to take the case there. If, therefore, suitors wish to have a preliminary question of law tried quickly, they know what they have to do; but, if one party wishes to have a preliminary question tried only for the purpose of delay, by carrying it to the House of Lords, the other party, if he is anxious to have his case disposed of quickly, had better resist to the utmost the making of an order for the trial of the preliminary question.

KAY L.J. We have to deal with a bill of lading relating to a shipment of frozen meat. The bill of lading has at the head of it the words "Refrigerator bill." It has been stated to us that for the carriage of a cargo of frozen meat a higher rate of freight is paid than for ordinary goods. The bill of lading states that the goods received on board the ship for carriage from Australia to England consist of so many carcases of hard frozen

mutton; and it is stated in express terms that this hard frozen mutton, so shipped in a refrigerator ship, is "to be delivered (subject to the exceptions and conditions hereinafter mentioned) in the like good order and condition" in London, when the responsibility of the shipowner is to cease. Then there follows a set of conditions or exceptions which we have already intimated relate to what may happen during the voyage, and not to the state of the ship or the machinery when the goods are placed on board. A defect in the state of the ship or the machinery when the goods are placed on board would not (it is enough for me to say might not) come within any of those exceptions. But I cannot help feeling that the real question which was submitted to my brother Mathew, and upon which this appeal is brought, may never arise at all. If it should turn out that the goods were not delivered in the order and condition in which they were shipped, and that that arose from the condition of the ship at the time when they were shipped, there would be a breach of the express contract contained in the bill of lading, and it would not be necessary to inquire whether there was any implied contract. Supposing, however, that it should be necessary to make such an inquiry, the real inquiry, as it seems to me, would be, not as to the "unseaworthiness" of the ship properly so called, but whether the ship was, at the time when the goods were shipped, provided with proper appliances to enable her to carry these goods in their hard frozen condition, and deliver them in that condition at the end of the voyage. If it be necessary to consider that question, the learned judge has treated it as being a question whether there was an implied warranty of "seaworthiness," as it is called; and no doubt the cases to which he referred, and other cases which might be cited, do appear to treat a matter of that kind as though it was within the ordinary warranty of "seaworthiness" of the ship. To take as an instance, *Steel* v. *State Line Steamship Co.* (1), I find that Lord Cairns L.C. uses this language (at p. 76): "What is the meaning of the contract created by those words, supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the

(1) 3 App. Cas. 72.

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shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy." And again he says (at p. 77): "It must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there can be no doubt that this would be the meaning of the contract, but it appears to me that the question is really concluded by authority." Then Lord Blackburn (at p. 86) says: "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." I read that for this purpose—I understand that one of the defences in the present case will be this—we did not contract absolutely that the ship was at the time of the shipment fit for the purpose; all we contracted was, that we would do everything we reasonably could do to make her fit for the purpose.

Now, Lord Blackburn distinctly deals with that question, and says that that is not the contract. It is ordinarily called a contract of "seaworthiness," though in the present case that would hardly be accurate language, for the question is not, properly speaking, one of the seaworthiness of the ship. But Lord Blackburn says it is ordinarily called a question of seaworthiness, and the warranty implied is, not an engagement that the shipowners will do their best to make the ship fit for the purpose of the particular voyage, but a warranty that she is

absolutely fit at the time when the goods are shipped. If it is necessary to decide the point, I think that in the present case, when you look at the nature of the contract—a contract contained in a bill of lading which is headed "Refrigerator bill"; a contract to carry meat which is described as being at the time of shipment "hard frozen"; a contract which provides that (subject to certain accidents which may occur during the voyage) the meat shall be delivered in the same good order and condition as that in which it was shipped—there is a clear implication—what Lord Cairns called "a representation and an engagement—a contract—by the shipowner that the ship is at the time of its departure" in a proper condition to carry out that particular voyage which is contracted for by the bill of lading.

Now, we have been told that refrigerator ships are provided with machinery by which air is compressed; and air if much compressed becomes so hot that you cannot bear to put your hand on the vessel in which it is contained, and that is because all the latent heat which was in the air still remains there when it is compressed into a small compass, and becomes apparent to the sense of touch. The compressed air is subjected to a cooling process which removes the heat which has thus become sensible; and when the air is allowed to expand again it is found to be without the heat which before was in it, and is very cold, and in that cold condition it is allowed to enter the refrigerating chamber, which it keeps sufficiently cool to preserve the meat in its frozen condition throughout the voyage, and thus enables the shipowner to fulfil his contract to deliver the meat in that condition. Now, if that machinery, at the time when the voyage began and when the meat was shipped, was not in a condition to perform that service, there would, in my opinion, be a breach of the implied contract to provide a ship fit for the service which the bill of lading contemplates, and that breach would not fall within any of the exceptions contained in the bill of lading. I think, therefore, that, if we are to decide this question, the appeal fails, and it must be dismissed.

A. L. SMITH L.J. I also think that my brother Mathew was right in holding that there is an implied term in the undertaking

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contained in this bill of lading that the ship *Maori King* and the refrigerating machinery therein were at the time of the shipment fit, under ordinary circumstances, to carry the frozen meat to Europe. Against that finding this appeal is brought.

The question turns upon a contract for carriage by sea, and different considerations apply to such a contract from those which apply to contracts for carriage by land. Now, the first part of this bill of lading is in a very ordinary form. It is given by the shipowner to the owner of the goods, and by it the shipowner contracts with the owner of the goods to carry hard frozen meat from Australia to London. The meat is stated to be "shipped in apparent good order and condition," and it is "to be delivered" (subject to certain exceptions) "in like good order and condition" from the ship's deck at the port of discharge in this country. I pause there for a moment to inquire whether in such a bill of lading there is any implied warranty that the ship (or I will say that part of the ship in which this frozen meat was to be taken), in which the shipowner undertook that he would carry these goods to this country, was fit for the purpose for which both parties were contracting when the bill of lading was given. It is true that connected with that part of this ship there was—and this was known to the parties contracting—special machinery to be employed, and to be kept employed during the voyage, otherwise this frozen meat would become decomposed, and under this bill of lading might then have been thrown overboard by the shipowner. But was there contained in the words which I have read a warranty that that part of the ship in which the meat was to be carried was, when the ship set sail, fit for the purpose for which the parties were contracting? In my opinion, there was. I will deal with the exceptions in a moment. But the importance of the point which was raised before my brother Mathew, and decided by him in favour of the plaintiffs, is this: that, unless there is this implied warranty that that part of the ship was fit for the purpose for which the parties were negotiating, it seems to me probable that the defendants would have an answer to the action in the exceptions from the absolute obligation to deliver in like good order and condition which are contained in the first part of the bill of lading. The bill

of lading runs thus: "Shipped in apparent good order and condition 4553 carcases of hard frozen mutton to be delivered in like good order and condition" except (inter alia) in the case of "failure or breakdown of machinery." Now, there has been a failure or breakdown of machinery on the voyage, and the main point now to be decided (I do not say the ultimate point to be decided when the action is tried) is, whether the plaintiffs are right in saying that there is an implied warranty that that part of the ship in which the meat is taken shall be "seaworthy" when the voyage begins. That is the real contest now. In my opinion there is such an implied warranty. Some observations made by me in 1884 in *Tattersall* v. *National Steamship Co.* (1) have been referred to. I think what I then said was right, because I really said no more than Lord Cairns and Lord Blackburn had said in *Steel* v. *State Line Steamship Co.* (2) I only stated in inferior language what those eminent judges had already laid down. Therefore I am of opinion, taking only the first part of this bill of lading, that there is an implied warranty such as my brother Mathew has held.

I come now to the point whether there are other terms in the bill of lading which shew that this implied warranty could not have been intended. An implication only arises when it must be presumed that the contracting parties intended what they did not put on paper. Could it be said even with plausibility here that the owner of the frozen meat was content to put it on board a ship with refrigerating machinery which was in such a state that, although it might hold together until the ship had set sail, might break down the day after, and yet he was not to look to the shipowner for damages? I think that is most improbable on both sides, and neither party intended it. In my opinion there is the implied warranty which I have mentioned; and in my judgment all the exceptions afterwards mentioned apply after the ship has set sail. They are exceptions during the voyage, when, if all or any of the matters which are mentioned take place, the shipowner is not to be liable. But if there is (as I hold there is) an implied warranty that the machinery shall be fit for its purpose when the ship sets sail, then, in my judgment,

(1) 12 Q. B. D. 297. (2) 3 App. Cas. 72.

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the exceptions in no way touch that, and are no answer to a claim by the owner of the goods founded on the original unfitness of the machinery. For these reasons I think my brother Mathew was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Parker, Garrett & Parker; Waltons, Johnson Bubb, & Whatton.*

W. L. C.

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[IN THE COURT OF APPEAL.]

MONSEN *v.* MACFARLANE & CO.

Ship—Charterparty—Colliery Guaranty—Incorporation in Charterparty—Demurrage—Commencement of Lay-days.

A charterparty, dated July 16, 1894, provided that the ship should proceed to a customary loading place in the Royal Dock, Grimsby and there receive a cargo of coal "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days." Demurrage to be at the rate of 4*d.* per ton per day.

By a colliery guaranty, dated July 20, 1894, the colliery company agreed with the charterers to load the ship with a cargo of coal "in fifteen colliery working days after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo (strikes of pitmen, &c., always excepted). Time not to commence before August 2. Time to count from the day following that on which notice of readiness is received, the said notice (in writing) to be handed to office . . . . as soon as the ship is actually ready as above stipulated and not before. . . . . The ship to move to the spout and proceed with her loading whenever required to do so during the entire continuance of her lay-days. Demurrage as per charterparty, but not exceeding 4*d.* per registered ton per colliery working day." The customary loading place for coal in the Royal Dock, Grimsby, was under a "spout" or shoot, through which the coal was shot on board the ship.

Notice that the ship was ready was given on September 3. She had to wait her turn to get under the spout, and, but for delay for which it was admitted the charterers were responsible, she could have been placed under it on September 17. She did not in fact get under it until October 10. The loading was completed on October 13. In an action by the shipowner against the charterers for demurrage:—

Held, by Lord Esher M.R. and A. L. Smith L.J. (affirming the decision of Mathew J.), Kay L.J. dissenting, that the provisions of the colliery

guaranty as to loading were incorporated into the charterparty, and that the fifteen lay-days commenced to run from the day after that on which notice was given that the ship was ready in the dock at Grimsby to receive the cargo:

Held, by Kay L.J., that the provisions of the colliery guaranty were not incorporated into the charterparty, and that the lay-days did not begin to run until the day after that on which the ship might, but for the acts of the defendants, have been under the spout.

APPEAL against a judgment of Mathew J.

The action was brought by a shipowner against the charterers of the ship for demurrage at the port of loading.

The charterparty was dated July 16, 1894, and it was thereby agreed that the ship *Fjeld*, being then in Grimsby, should, with all convenient speed, "proceed to a customary loading place in the Royal Dock, Grimsby, as required by charterers, . . . and there receive on board from the factors, or agents of the charterers, a full and complete cargo of Kiveton Park coals from such colliery as charterers or their agents may direct. . . . To be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days. . . . Demurrage to be at the rate of 4*d.* per register ton per day."

The colliery guaranty (which was in a form in common use at the port of Grimsby) was dated July 20, 1894, and was addressed to the charterers. By it the Kiveton Park Coal Company undertook "to load the ship *Fjeld* with best hard steam coal in fifteen colliery working days (Sundays and colliery holidays not working days) after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo (strikes of pitmen, frosts and storms, delays at spout caused by stormy weather or floods, or delay on the part of the railway company, either in supplying trucks or loading the coals from the colliery, or any other accident stopping the workings, loading or shipping of the said cargo always excepted). Time not to commence before August 2, 1894. Time to count from the day following that on which notice of readiness is received, the said notice (in writing) to be handed to office during office hours as soon as the ship is actually ready as above stipulated and not before. No notices received on Sundays or any colliery holidays. The ship to move to the spout and proceed with her loading whenever required to

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do so during the entire continuance of her lay-days. Demurrage as per charterparty, but not exceeding 4*d.* per registered ton per colliery working day."

There was only one coal staith or spout in the Royal Dock, Grimsby, at which a ship of the size of the *Fjeld* could load, and all ships loading coal at the Royal Dock were obliged to load at a coal staith, this being the "customary loading place." On September 3 the captain gave notice that the ship was ready to load, and she was entered in the "turn book" as ready to go to the staith. Her turn did not come until September 17, and she could not therefore have loaded any coal till that day. The colliery company did not give notice that they were ready to deliver the coal until October 9. The ship went to the staith on October 10, and her loading was completed on October 13. If she had gone to the staith on September 17 her loading would have been completed on September 20.

Mathew J. held that the provisions of the colliery guaranty as to loading were incorporated into the charterparty, and that the plaintiff was entitled to twenty-three days' demurrage from September 20 to October 13.

The defendants appealed.

Joseph Walton, Q.C., and *Danckwerts*, for the defendants. The colliery guaranty is not incorporated in the charterparty. The shipowner was not a party to the guaranty and had no control over it. It was executed after the charterparty, and the shipowner never even saw it. It is addressed to the charterers, not to the shipowner. Though the custom of a port may be introduced into a charterparty there is no authority for incorporating a distinct document such as this colliery guaranty. The lay-days do not commence until the ship has arrived at the customary loading place—i.e. at the berth: *Nelson* v. *Dahl* (1); *Tharsis Sulphur, &c., Co.* v. *Morel Brothers & Co.* (2); *Good & Co.* v. *Isaacs.* (3) The reference in the charterparty to the colliery guaranty could not alter the place of destination previously mentioned in the charterparty. The ship was in the Royal Dock

(1) 12 Ch. D. 568, 581. (2) [1891] 2 Q. B. 647.
(3) [1892] 2 Q. B. 555.

on September 4; if she had had her proper turn she would have got to the loading place on September 17. She did not get there till October 10. This was the fault of the coal company, because they gave a preference to other vessels. The shipowner cannot sue upon the colliery guaranty unless it is introduced into and made part of the charterparty: *Restitution Steamship Co.* v. *Pirie & Co.* (1) A clause which incorporates a colliery guaranty into a charterparty ought to be construed so as to give effect to the whole of the charterparty. It being known that the ship was already in Grimsby Dock when the charterparty was executed, she was not an "arrived" ship until she was under the "staith." She was not "ready" until she was at the place at which according to the custom of the port she ought to load: *Good & Co.* v. *Isaacs.* (2) The reference to the colliery guaranty is controlled by the words "to be loaded as customary at Grimsby": *Tapscott* v. *Balfour.* (3)

Even if the colliery guaranty is imported into the charterparty, the words "ready in the dock at Grimsby to receive her cargo" mean "ready under the staith." There was evidence that the ship might have got under the staith on September 17. The fifteen days would then have run from September 18, and, there being two Sundays included, the lay-days would have expired on October 4.

Lawson Walton, Q.C., and *T. G. Carver*, for the plaintiff. It is admitted that, if there were not any special clause in the charterparty, the lay-days would not commence until the ship had got to the place where she could load her cargo. But there is a special clause in this charterparty, and it imposes an express obligation. The charterparty contains no provision as to loading except in the reference to the colliery guaranty, and that guaranty defines the loading obligations of the charterers. The guaranty is in a form in common use at the port, and all its provisions as to the loading of the ship are incorporated into the charterparty.

Joseph Walton, Q.C., in reply. The provisions of the colliery guaranty as to the loading of the ship may be imported into

(1) 61 L. T. (N.S.) 330. (2) [1892] 2 Q. B. 555.
(3) L. R. 8 C. P. 46.

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the charterparty, but not the provision as to the time when the ship is to be treated as "arrived." It may well be that the colliery company are bound more strictly to the charterers than the charterers are to the shipowner.

Cur. adv. vult.

July 30. LORD ESHER M.R. This is an action for demurrage brought by a shipowner against the charterers of the ship. The action is brought upon the charterparty, and the dispute is as to the day on which the lay-days began. I will consider for a moment the subject-matter of such a contract. In *Nelson* v. *Dahl* (1) this Court took occasion to explain several well-known forms of charterparty and to state when under those forms the lay-days would commence. But that was not intended to be an exhaustive enumeration. There may well be other forms of charterparty to which the rule laid down in that case is not applicable. It appears to me that the charterparty in the present case is not within any of the forms which were dealt with in *Nelson* v. *Dahl* (1), but is one which applies to a particular port. That port is a coal port—a port at which coals are shipped direct from the colliery. Who are the parties to the loading of a ship? Primarily the shipowner and the shipper. The loading is a combined operation by the shipper and the shipowner. The shipowner is bound to have his ship ready to receive the cargo, and the shipper is bound to have his cargo ready to put into the ship. He is bound to bring the cargo to the side of the ship and up to the deck, and then the shipowner has to receive the cargo and to deal with it. But in such a port as Grimsby there are other parties without whose concurrence the work of loading a ship cannot be done. The port consists of a dock which is under the control of a harbour-master. The shipowner cannot place his ship just where he pleases; he must submit to the regulations of the harbour-master. The coals are brought to the port by the colliery owner, and they have to be put on board the ship by means of a "staith" or "spout," under which the ship has to lie. The coals cannot come there without the act of the colliery owner. In such a port as this there are there-

(1) 12 Ch. D. 568.

fore four parties to the transaction of loading a ship with coal—the shipowner, the charterer, the colliery owner, and the harbour-master. It follows that in such a port there must be some customary mode of dealing with a cargo, and the charterparty must be in a form appropriate to such a method of loading. It appears to me that the form of charterparty which has been used here enables the parties to deal properly with all these matters. It begins in the ordinary way. Then it says that the ship, being then in Grimsby, is to proceed with all convenient speed "to a customary loading place in the Royal Dock, Grimsby," but it does not say where that place is. Then the transaction is described in general terms. But, inasmuch as there are several parties to the transaction of loading, it was necessary to determine the rights, duties, and liabilities of each party, and in a charterparty that is always done by the demurrage clause. The object of that clause is to settle the rights, duties and liabilities of the parties to the loading of the ship. That clause is one, not several clauses; if the duties and liabilities are settled as regards one party they are necessarily settled as regards them all. The object is to determine the rights, duties, and liabilities of each party to the one transaction of loading. The charterparty deals with each part of the transaction as a part of the one transaction consisting of that which each party has to do. Here the ship is "to be loaded as customary at Grimsby as per colliery guarantee," that is, as customary at Grimsby when there is a colliery guaranty, and she is to be loaded in "fifteen colliery working days." This deals with the right of the charterer, and it gives him fifteen working days in which to perform his part of the transaction. The charterer takes, and the shipowner gives him a margin of time. Then demurrage is to be at a specified rate per diem. Demurrage does not apply to the lay-days; it is to be paid for additional days beyond the fifteen days. If the ship is detained beyond the fifteen days demurrage is to be paid by the charterer by way of damages. The "lay-days" are the loading days. A specified number of days is given to the charterer in which he is to perform his part of the loading of the vessel. A longer time is allowed than would be required if the charterer used the utmost expedition; but in order to meet

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contingencies a considerable margin is allowed. The loading is to be "as customary at Grimsby as per colliery guarantee." The effect of those words is, in my opinion, to incorporate the colliery guaranty into the charterparty, and to introduce it, so far as it is applicable, into the demurrage clause. The charterer undertakes to load the ship "in fifteen colliery working days." The colliery guaranty adopts the same figures, and the coal company undertake to load the ship "in fifteen colliery working days after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo." "Time to count from the day following that on which notice of readiness is received." It is necessary to fix the time from which the lay-days are to run. They are, in my opinion, to run from the day following that on which the shipowner gives notice in writing that the ship is ready to receive the cargo. But, when a ship in such a port as this is subject to the control of the harbour-master, it is customary for the shipowner to give notice of readiness to him as well as to the charterer, and then the ship is put by the harbour-master on turn to go under the spout according to the date of the notice. If when the ship's turn comes the charterer has not got the coal ready to put on board the harbour-master will pass her by, and allow another ship to go under the spout. It would be absurd to place the ship under the spout if the coals are not ready to be put on board. The coals are not delivered to the shipowner until they are at the bottom of the spout. It is the duty of the charterer to see that he has the use of the spout within the appointed lay-days. Suppose the colliery owner did not bring the coal to the spout within the time fixed by the charterparty, who would be answerable for the delay? As between the shipowner and the charterer, clearly the latter would be answerable. The charterer must see that he had the coal ready to be loaded at the spout within the lay-days. It is for this reason that at such a port as this the charterer always takes care to obtain from the colliery owner a guaranty that the coals shall be delivered to him within the same time as that which is fixed by the charterparty for the loading. The charterer is under an obligation to the shipowner, and he has by means of the guaranty a remedy over against the colliery owner.

This being the state of things, when did the lay-days begin in the present case? It would, as Mathew J. said, be as a matter of business ridiculous to say that they began only when the ship was actually under the spout. The harbour-master would certainly not allow her to remain under the spout for fifteen days. It is proved that it would take only three days to load the ship working day and night. The harbour-master would not allow her to go under the spout until the coal was ready to be shipped. So that, if the lay-days did not commence until the ship was under the spout, there never could be any demurrage. Either the ship would never come under the spout at all, or there never could be any demurrage. It was for this reason that the colliery guaranty fixed the date from which the lay-days were to begin by the provision, "time to count from the day following that on which notice of readiness is received." What is meant by "readiness"? All that the shipowner could do was to get his ship ready, so that when she was under the spout she would be able at once to receive the coal. He must place the ship as near to the spout as the harbour-master would permit her to be, and have everything on board ready for the reception of the coal, and when she is in that place and condition he is to give notice of readiness to the charterer that he may get his coal ready for shipment. Notice must also be given to the harbour-master. It seems to me, therefore, upon the construction of this charter, coupled with the colliery guaranty, that the lay-days begin to run on the day after that on which notice of readiness is received by the charterer, and after that everything is at the risk of the charterer. If the colliery owner does not fulfil his obligation to the charterer, the charterer will have to pay demurrage to the shipowner, and under the guaranty he will be able to recover from the colliery owner. In my opinion, therefore, the judgment of Mathew J. was right, and should be affirmed.

KAY L.J. This appeal does not raise any question of mercantile or commercial law, but only what is the right construction of a charterparty.

The action is by a shipowner against the charterers for demurrage at the port of loading.

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The charterparty is in a form calculated to puzzle any one as to its meaning. It refers to another document called a colliery guaranty, and whether any, and, if any, what part of that guaranty is incorporated in the charterparty, and, if it be, what is the effect of the incorporation is the problem to be solved. The charterparty provides for lay-days: the question is when they began. The lay-days are fifteen; but they are not fifteen loading days: they are fifteen "colliery working days." The cargo to be shipped was coal. It would seem that the charterers wished to stipulate for an ample number of days to enable them to obtain the coal from the colliery. The ship was actually loaded in three days. Fifteen days would be much longer than would be requisite if the coal was ready. The fifteen days were wanted to give sufficient time for the coal to be got ready.

Without the colliery guaranty the form of the charterparty is one as to which a number of decisions have established a canon of construction. It is an agreement that the ship *Fjeld*, then in Grimsby, should with all convenient speed "proceed to a customary loading place in Royal Dock, Grimsby, or as near thereto as she may safely get always afloat, and there receive on board from the factors or agents of the said charterers a full and complete cargo of Kiveton Park coals from such colliery as the charterers or their agents may direct"; and, among other exceptions, there is this: "strikes, lock-outs, or accidents at the colliery directed, or on railways, or any other hindrances of what nature soever beyond the charterers' or their agents' control throughout this charter always excepted"; and the charterparty contained these words, which occasion the difficulty: "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days." Omitting the words "as per colliery guarantee," it has been decided in several cases, of which *Nelson* v. *Dahl* (1), *Tharsis Sulphur Co.* v. *Morel Brothers & Co.* (2), and *Good* v. *Isaacs* (3) are the latest, that, according to the true construction of such a charterparty, the lay-days, which are the time within which the ship is to load, do not begin until she has arrived at the place mentioned in the char-

(1) 12 Ch. D. 568; affirmed 6 App. Cas. 38.

(2) [1891] 2 Q. B. 647.

(3) [1892] 2 Q. B. 555.

terparty where the loading is to be made. Moreover, notice that the ship is ready to receive her cargo need not be given until she is at the place named: *Nelson* v. *Dahl*. (1) The place named in this charterparty is "a customary loading place in Royal Dock, Grimsby." In this Royal Dock there are two berths with shoots or "spouts," as they are called in these documents, for loading coal into ships. Only one of these berths had sufficient depth of water to float the *Fjeld*. Therefore, this berth was the place of loading indicated in this charterparty; and, as the ship could not occupy the berth until permitted by the harbour-master, primâ facie the lay-days would not begin until the ship occupied the berth by that permission. Of course, the colliery owners were not parties to this contract. When the charterparty was signed no colliery guaranty had been given as to the cargo for this ship, but one was arranged shortly afterwards. I understand that it was in a printed form filled up in writing. It was an agreement by the owners of the Kiveton Colliery with the charterers. The shipowner was not a party to it. By it the colliery owners undertook to load the *Fjeld* with coal "in fifteen colliery working days (Sundays and colliery holidays not working days), after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo (strikes of pitmen, frosts and storms, delays at spout caused by stormy weather or floods, or delay on the part of the railway company, either in supplying trucks or loading the coals from the colliery, or any other accident stopping the workings, loading or shipping of the cargo always excepted)." So far it seems to be part of the common form. There is then introduced in writing: "Time not to commence before August 2, 1894"; and then follows in the common form: "Time to count from the day following that on which notice of readiness is received; the said notice (in writing) to be handed to office during office hours, 9 A.M. to 5 P.M.; Saturdays, 9 A.M. to 1 P.M., as soon as the ship is actually ready, as above stipulated, and not before. No notice received on Sundays or any colliery holidays." I pause to observe that, this being an agreement between the colliery owners and the charterers, the notice here referred to is a notice,

(1) 12 Ch. D. at p. 581.

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not by the shipowner, who had nothing to do with the colliery owners, but by the charterers to the colliery owners, and the stipulations as to the hours at which, and the office at which, the notice was to be delivered did not affect the shipowner in any way. The office referred to is the office of the colliery company. The guaranty proceeds: "The ship to move to the spout and proceed with her loading whenever required to do so during the entire continuance of her lay-days. Demurrage as per charterparty, but not exceeding 4*d.* per registered ton per colliery working day. The non-fulfilment of any of the above conditions to render this guarantee null and void." These conditions cannot, I should think, be imported into the charterparty. How could any one seriously contend that a failure by the colliery owners or the charterers to observe the provisions of the guaranty would make the charterparty void, or how could the stipulation as to the amount of demurrage between the colliery owners and the charterers affect the shipowner? Moreover, the clause as to demurrage distinguishes in terms between the guaranty and the charterparty—"Demurrage as per charterparty." The exceptions in the guaranty are worded differently from those in the charterparty. Can these be treated as added to those in the charterparty? Even if the exceptions in the charterparty are equally extensive, the argument loses none of its force: one set were as between the charterers and the shipowner; the other between the charterers and the colliery owners. They could not be read as being twice over in the charterparty. It, therefore, seems to me unreasonable to say that the whole of the guaranty is to be read into the charterparty. Is any part of it incorporated? I should rather construe the reference to the guaranty as meaning only to explain why the lay-days are to be "colliery working days." "Fifteen colliery working days as per colliery guarantee," referring to the guaranty to describe the colliery working days, or perhaps only to shew why that description of the days was used in the charterparty. I cannot read the charterparty as meaning that whatever stipulations as to time might be contained in any guaranty thereafter to be given by the colliery owners to the charterers should be treated as binding between the charterers and the shipowner.

Take, for instance, the special provision introduced in writing, "Time not to commence before August 2, 1894." Can the shipowner be held bound by this provision, which did not exist in the common form, and could not be anticipated when he signed the charterparty on July 16? Suppose the berth and the ship had been ready on July 17, could not the shipowner have claimed demurrage if the ship were not loaded within fifteen colliery working days thereafter? Or suppose the charterers delayed giving notice to the colliery owners that the ship was ready, is the shipowner only to begin the lay-days from one day after that notice was given by the charterers to the colliery owners? The learned judge seems to have considered that the lay-days began on the day following that on which the shipowner gave notice to the charterers that the ship was ready. This he says was on September 3, so that the lay-days began on the 4th. The ship could not get to the berth indicated in the charterparty till September 17. I confess I cannot find anywhere in these documents, whether read together or separately, an agreement that the lay-days are to begin one day after notice by the shipowner that the ship is ready. The notice mentioned in the guaranty, as I have already pointed out, is a notice to be given by the charterers to the colliery owners, and to read that as meaning a notice given by the shipowner to the charterers is not to construe the agreement, but to add to it a stipulation which it does not contain. Moreover, the words in the guaranty, "After the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo," I should read as meaning "ready according to the charterparty." That clause does not refer merely to the ship being empty. If it did, the reference to the dock would be unmeaning. "Ready in dock" does not mean ready in any dock. It must mean ready in the dock in which the ship was to be loaded. It is agreed that she could not be loaded in the Royal Dock until she got under one particular spout; and "to be loaded as customary at Grimsby" in the Royal Dock means to be loaded at that spout. Therefore it seems to me that, even as between the colliery owners and the charterers, the ship would not be ready in dock until she was at the spout.

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The construction which the learned judge has put upon this charterparty involves a result which, as it seems to me, neither party intended, and which would be very unjust. If, whenever the ship was empty and in a condition to receive cargo and lying in the Royal Dock, notice might be given by the shipowner to the charterers, and the lay-days must then commence, that notice might be given, although it was perfectly well known that she could not get to her berth under the spout within fifteen days. It seems to me impossible to suppose that the charterers intended to run this risk.

In my opinion the lay-days ought not to begin before September 17, the first day on which the ship could get to her berth in the Royal Dock.

As September 17 was the first day on which by the custom of the port the ship could occupy her berth, in my opinion the lay-days began then. The fifteen lay-days would expire on October 2; and the demurrage should, I think, be reckoned from that date.

A. L. SMITH L.J. (after reading the charterparty and the colliery guaranty, continued). I cannot doubt that the meaning of the guaranty, as between the charterers and the Kiveton Park colliery, is that the colliery company (subject to the exceptions mentioned) undertook to load the ship with coal within fifteen colliery working days from the day after that upon which notice was given that the ship was ready in the dock at Grimsby to receive her entire cargo—i.e., empty and ready in dock to receive it—and that, as between the charterers and the colliery company, the latter had then fifteen working days in which to load the ship, although the actual loading whilst under the spout might only occupy two or three days. It has been found by my brother Mathew that the ship was ready in the dock to receive her cargo upon September 3, when due notice thereof was given, and he held that the fifteen lay-days commenced to run from the next day—namely, September 4, 1894—he being of opinion that the terms of the colliery guaranty as to loading, which necessarily included the question of lay-days, were incorporated into the charterparty by the clause, "To be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working

days." The defendants contend that this is not so, and that by the terms of the charterparty the lay-days did not commence until the ship was under the spout, which was the customary loading place in the Royal Dock at Grimsby. They admit that under the circumstances of this case the lay-days began on September 18; for the ship, but for the defendants' acts, could have been under the spout on September 17, and also that she was kept away from the spout by acts for which the defendants are responsible from that day (September 17) until October 10, 1894, when she went under the spout and loaded a full and complete cargo in three days, ending on October 13, 1894. Now, the object for which a colliery guaranty is taken by and given to a charterer, and for which it is by him incorporated into a charterparty, is well known to shipowners, charterers, and colliery proprietors, and it is admitted that the guaranty in the present case is in the ordinary form, being mostly in print. It is a document which is obtained by a charterer, who is about to load a ship under a charterparty with coals, from a colliery owner, in order that the charterer may obtain from him a guaranty that he will load the ship with coal within a given time, i.e. within a given number of lay-days. It is a document which the charterer who takes coal from a colliery wherewith to load a ship is ever anxious to have incorporated into the charterparty, so that, as regards the time to be occupied in loading the ship, he may be under no greater obligation to the shipowner than the colliery owner is under to him, and by its incorporation he secures for himself the advantage of not having to pay damages (whether by way of demurrage or detention) to the shipowner which he cannot recover over against the colliery owner, who is the real master of the situation as regards the time to be occupied in loading the ship with coal.

I agree with the argument of the defendants, that, if the first clause in the charterparty, namely, "the ship . . . shall proceed to a customary loading place in the Royal Dock, Grimsby, as required by the charterers, and there receive on board a full and complete cargo of Kiveton Park coals," had stood alone, the cases of *Nelson* v. *Dahl* (1), *Tharsis Sulphur Co.* v. *Morel*

(1) 12 Ch. D. 568.

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Brothers & Co. (1), and *Good* v. *Isaacs* (2) have decided that the ship would not have been an "arrived ship," so that the lay-days would commence to run, until she had got under the spout in the Royal Dock at Grimsby, which was the named place in that dock to which the shipowner had to take his ship in order to receive her cargo. But by this charterparty, in addition to the above-mentioned clause, it was expressly agreed between the shipowner and the charterers that the ship was "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days," and, when that guaranty is looked at, it appears to me that the fifteen lay-days in which the ship was to be loaded were to commence to run, not from the date when the ship was under the spout, as the defendants now contend, but from the day after that on which notice was given that the ship was wholly unballasted and ready in the dock at Grimsby to receive her entire cargo. Now, what is the meaning of the clause in the charterparty "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days"? Does it mean that the ship is to be loaded as customary at Grimsby in fifteen colliery working days after the ship is under the spout, which is certainly not in accordance with the terms of the colliery guaranty, or does it mean that the ship is to be loaded as customary at Grimsby in fifteen colliery working days after notice given that the ship is in the dock ready to receive her entire cargo, which is in accordance with the colliery guaranty? I cannot read this charterparty otherwise than as a contract in this latter sense. I read the words "to be loaded as customary at Grimsby as per colliery guarantee" as meaning "as provided for by the guarantee," which clearly made the fifteen lay-days in which the ship was to be loaded by the charterer commence from the day after the notice of readiness was given, and not from the day when the ship happened to get under the spout. If this charterparty is to be read as meaning that, as between the shipowner and the charterer, the lay-days were to begin at one date, and, as between the charterer and colliery owner, they were to begin at another, it would frustrate the very object for which the charterer obtained the incorporation of the colliery

(1) [1891] 2 Q. B. 647. (2) [1892] 2 Q. B. 555.

guaranty as to loading, and to which the shipowner agreed, and I cannot think that this is its true construction. It would require strong words in the charterparty to shew that this was the intention of the parties and was the true construction of the charterparty, and no such words are to be found therein.

It is true that, under the peculiar circumstances of this case, the charterers having kept the ship away from the spout from September 17, 1894, to October 10, 1894, the incorporation of the colliery guaranty into the charterparty has in the result turned out a detriment to the charterers, instead of, as they contemplated, to their advantage; but this cannot affect the true reading of the charterparty with the incorporated guaranty; and, in my judgment, for the reasons which I have given Mathew J. was right in the conclusion at which he arrived, and this appeal must be dismissed with costs.

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Appeal dismissed.

Solicitors: *Rowcliffes, Raule & Co., for Hill & Dickinson, Liverpool; Stokes & Stokes.*

W. L. C.

[IN THE COURT OF APPEAL.]

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LAVY *v.* LONDON COUNTY COUNCIL.

Metropolis—Management Acts—General Line of Buildings—"Building, Structure, or Erection"—Metropolis Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.

The question whether a wall is a "building, structure, or erection" within the meaning of s. 75 of the Metropolis Management Act, 1862, depends upon the height of the wall and the purpose for which it is built.

The forecourt of a house in a street in the metropolis had for many years been bounded on the side nearest the street by a dwarf wall between two and three feet high. The owner of the premises pulled down the dwarf wall and built on its site a wall eleven feet high, which was intended to be used as a screen on which to exhibit advertisements, and also to serve as a boundary to the forecourt. The new wall was beyond the general line of buildings in the street, and was erected without the consent of the London County Council:—

Held (affirming the decision of the Divisional Court), that the dwarf wall was not a "building, structure, or erection" within the meaning of s. 75 of the Metropolis Management Act, 1862, and that so long as it existed the

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site on which it stood was to be regarded as vacant land for the purposes of the section, but that the substituted wall was a "building, structure, or erection" within the section, and that the magistrate had jurisdiction to order its demolition.

Held, also, that the issuing of the certificate of the superintending architect of the general line of buildings was not a condition precedent to the taking out of the summons against the owner of the house; and that as the order was made after the certificate had been issued, the order was valid.

APPEAL from the decision of a Divisional Court (Day and Wright JJ.). (1)

The appellants were the owners of a dwelling-house and premises in the metropolis situate at the corner of the City Road and Duncan Terrace. The house stood back about thirty-eight feet from the footway of the City Road, and the space between the house and the footway was a forecourt, which for many years prior to 1894 had been bounded on the side towards the City Road and Duncan Terrace, by a dwarf brick wall two or three feet in height and nine inches in thickness above the footings, surmounted by a stone coping, and upon the coping were iron railings five feet six inches in height. In May, 1894, the appellants removed the dwarf wall to its footings, and erected upon the footings a wall eleven feet high and strengthened by piers. This wall was erected as a station on which to exhibit advertisements, but was also intended to serve as a boundary wall to the forecourt. The whole of the wall was in front of the general line of buildings as certified by the superintending architect, and was erected without the consent of the respondents, the London County Council. The appellants were summoned for having unlawfully erected a structure beyond the general line of buildings without the consent of the London County Council, contrary to the provisions of s. 75 of the Metropolis Management Act, 1862. The certificate of the superintending architect had not been issued when the summons was taken out, but it had been issued before the summons was heard by the magistrate. The Divisional Court held, affirming the decision of the magistrate, that the new wall so built by the appellants was a structure within the meaning of the statute, and ordered its demolition.

(1) [1895] 1 Q. B. 915.

McCall, Q.C., and *R. C. Glen*, for the appellants. In the first place, the new wall was not a building within the meaning of the Act; and, secondly, if it was a building, the dwarf wall which existed before was also a building: *Wendon* v. *London County Council* (1); *Lord Auckland* v. *Westminster Board of Works.* (2) There is a further objection to the order in the present case, that the certificate of the superintending architect had not been given when the summons was taken out. The issue of the certificate is a condition precedent to the summons being taken out: *Spackman* v. *Plumstead Board of Works.* (3)

Forman, (*Channell, Q.C., F. K. North*, and *Duddy*, with him), for the respondents. The issuing of the certificate was not a condition precedent to the summons being taken out, and it was issued before the summons was heard; the order was, therefore, quite regular: *London County Council* v. *Cross* (4); *Bauman* v. *Vestry of St. Pancras.* (5) With respect to the wall, it is a question of degree whether it is a building or not within the Act. In the present case it was not merely a boundary wall, but was a station for advertisements: *Ellis* v. *Plumstead Board of Works.* (6)

R. C. Glen, in reply.

LINDLEY L.J. This case raises a question of some importance as to the power of the London County Council to order a structure to be pulled down under the provisions of the Metropolis Management Acts. The facts of the case are these. The appellants here are the owners of a house in the City Road, and it is quite obvious that long before there was any controversy about what they might do or might not do there was, to use the language of s. 75 of the Act, "a general line of buildings." It was an old road, and it is impossible to read the facts stated by the magistrate without seeing that there was then a general line of buildings, although there was no architect's certificate. In 1892 the appellants wanted to build over the garden in front of their house, which house was in the general line of buildings, and the authorities objected. In 1894 the appellants applied again for

(1) [1894] 1 Q. B. 812.
(2) L. R. 7 Ch. 597.
(3) 10 App. Cas. 229.
(4) 61 L. J. (M.C.) 160.
(5) L. R. 2 Q. B. 528.
(6) 68 L. T. 291.

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liberty to erect some kind of building, and again that was objected to.

Now, the state of things at that time was this. The appellants, as I said, had a house in a row, and the general line of buildings was obvious to everybody. Their little garden in front was bounded by a dwarf wall two or three feet high and nine inches in thickness, with a coping, and then iron railings some five feet high at the top. Now, after the authorities had been applied to for consent, and after they had objected, what the appellants did they did with their eyes open. They have pulled down the dwarf wall and have built another wall eighteen inches thick of a totally different description, eleven feet high, and strengthened by piers, and their object is, as the case states, to utilize that wall as a screen for advertisements. Then the London County Council took out a summons in order to compel them to pull that down. At that time, to my mind, the appellants had clearly erected a new building—I will consider presently the language of the Act—which was in front of the general line of buildings, and they had done that which they had no right to do under s. 75.

The summons was taken out on July 11, 1894. Two days afterwards the architect fixed this line: whether it was exactly the old line of buildings or not, I do not know; however, he fixed the line. Then there was a dispute about that and an appeal, and ultimately the summons was heard, and, the magistrate having heard this summons, finds as a fact as follows: "The whole of the said wall, which I find so far as it is a question of fact to be a structure, is in front of the line of fronts of the adjacent houses and of the general line of buildings defined as hereinafter mentioned. And it is situate in the City Road at a point where the distance of the general line of buildings from the highway does not exceed fifty feet." Therefore, so far as it is a question of fact, the magistrate finds against the appellants, and the order is made on this summons for the demolition of this wall. Then they appeal, and the points they take on the appeal are these: first, that the magistrate had no jurisdiction to entertain the summons, because when the summons was taken out the architect had not defined the line, and that his certificate is a condition

precedent even to the issue of the summons; and reliance is placed upon the judgment of Lord Selborne in the case of *Spackman* v. *Plumstead Board of Works* (1) in support of that contention. This is not the first time that I have had to consider the decision of Lord Selborne in that case. It was carefully examined by my brother Kay and myself in the case of *London County Council* v. *Cross* (2), and we came to the conclusion then, as I do now, that Lord Selborne's judgment does not go anything like the length contended for by the appellants. The case of *London County Council* v. *Cross* (2) is a decision which I not only think is correct, but it is a decision of the Court of Appeal which we should be bound to follow whether we thought it right or not. That is a decision to the effect that where you have, as you have here, a clear general line of buildings, the section is contravened by anybody who, without the consent of the local authority, builds beyond the general line. I agree that it was held that the penalty cannot be imposed or an order cannot be made for the demolition of buildings unless the general line is certified before the penalty is imposed or the order has been made. That I think does follow, not only from the language of the section but from the two decisions upon it. Therefore, that first point I consider is covered by *London County Council* v. *Cross* (2), which decision I am prepared to abide by and to follow.

The next part of the case is this. It is said that this wall, the nature of which I have described, is not a building, structure, or erection within the meaning of s 75 of the Metropolis Management Act, 1862, and reliance is placed upon the case of *Wendon* v. *London County Council* (3), in which it was held that a particular wall was not within that section. Now, our position is this. The magistrate found as a fact that this is a building, structure, or erection erected beyond the general line. We are asked to say, I suppose as a matter of law, that it cannot be. It seems to me it would be perfectly absurd to say that. When you know the nature of this erection it seems to me we should be stultifying ourselves if we said as a matter of law that it could not be a building, structure, or erection. I have not the slightest

(1) 10 App. Cas. 229. (2) 61 L. J. (M.C.) 160.
(3) [1894] 1 Q. B. 812.

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doubt myself that the finding of the magistrate was perfectly right on the facts.

But reliance was also placed with reference to this particular part of the case, which is an important one, upon the decision of the Court of Appeal in the case of *Lord Auckland* v. *Westminster Board of Works* (1), where a construction was put for the first time upon s. 75 of the Act of 1862. What the Court of Appeal held there was not only good sense, but is obviously correct on the true construction of the Act of Parliament; and it was to this effect, that the local authority cannot avail themselves of s. 75 to get out of their obligation under s. 74; if they are bound to make complaint under s. 74, they cannot condemn under s. 75. James and Mellish L.JJ. pointed out that in order to avoid such a result as that the 75th section would have to be read in substance as if it ran, "No *new* building, structure, or erection shall be made," and so on. Then the appellants contend that if they had only raised the old boundary wall they would not have contravened s. 75. I do not say that they would. There I think it does become a question in each case of what has been done. In *Wendon* v. *London County Council* (2) the Court of Appeal found, having regard to the facts of that case, that the wall which was there under consideration did not come within "a building, structure, or erection." Of course, in one sense every wall, everything erected, is a building, structure, or erection; but that section must be construed reasonably and with reference to the object for which it is passed. That is apparent from the case of *Ellis* v. *Plumstead Board of Works* (3), to which Mr. Forman referred, where it was said (and I have no doubt correctly said) that if a man merely puts up a fence to mark off his boundary and preserve his rights as the owner, although in one sense it may be a building, structure, or erection, it is not necessarily a building, structure, or erection which falls within the mischief aimed at by the Act and avoided by s. 75.

We must look at this case, and not at the effect of other cases. In this case we must ask ourselves, as men of the world, whether such a new wall as this is not a building, structure, or erection

(1) L. R. 7 Ch. 597. (2) [1894] 1 Q. B. 812.
(3) 68 L. T. 291.

within the mischief of s. 75. I have not the slightest hesitation whatever in saying that I think it is. I do not hesitate to say that I think repairing an old dwarf wall and putting on new rails instead of the old ones, if worn out, would not be an infringement of the section; but this is an entire structure or building of a totally different character from what was there before, and for a totally different purpose, and it is merely an attempt to throw dust in the eyes of the Court to say that this is only a boundary wall. It is nothing of the sort: it is a large, strong wall—it is an eighteen-inch wall, which answers the purpose of a boundary wall of course, but it is not wanted of that size and of that height for the reasonable preservation of that little bit of yard behind it; it is intended and is adapted for a totally different purpose. I think the appeal fails on every point, and must be dismissed with costs.

LOPES L.J. I am of the same opinion. The facts may be shortly stated thus. The forecourt of a house belonging to the appellants in a street in the metropolis has been for many years bounded on the side next the street by a dwarf wall about two or three feet high. The defendants, the owners, pulled down this dwarf wall and built on its site a wall eleven feet high, intending to use that wall for the purpose of exhibiting advertisements upon it, and also intending it to serve as a boundary wall to their premises, much in the same way, I presume, as the dwarf wall had served before. This new wall, beyond all question, it is not disputed, was beyond the general line of buildings and so forth, and it is also not disputed that it was erected without the sanction of the London County Council. That being so, two points arise. It is contended by the appellants in the first place that no offence has been committed, because at the time that the complaint to the magistrate was made no general line of buildings had been defined by the architect. It is said that the defining of that line by the architect was a condition precedent to any proceedings being instituted, and therefore that this offence is not made out. Now, in my opinion, the defining of that line is not a condition precedent. I should have said so myself if I had had to construe the Act for the first time; but the point has been

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considered more than once. It was most carefully considered in the case of the *London County Council* v. *Cross* (1); and I find my brother Lindley L.J. used these words, which have strong reference to this point: "But it is contended that there was not then any offence, or matter of complaint, because the architect's certificate defining the line of buildings was not then in existence, and we are asked to say that there is no offence until the architect's certificate is made." Then the Lord Justice proceeds: "That appears to me contrary to the construction of the section if we look at it apart from authority, and contrary to the construction which has always been put on that section by the Court." To my mind, that clearly disposes of that point. I quite agree with what has been said, that before a conviction is obtained that that line would have to be defined; but it is not a condition precedent. It has been also suggested that adopting that view creates a hardship, inasmuch as the person may not know what the line might be, and therefore may build and afterwards find that he is subjected to being convicted and having his building demolished. Really that is not so when you look at the whole of the provisions. They have to obtain the consent of the London County Council. In this case it appears that they had endeavoured to obtain it, and failed to obtain it; and it cannot be possibly said that they did what they did with their eyes shut. Their eyes were open, and they knew perfectly well what they were doing. I do not think, therefore, they are to be commiserated with regard to that which has happened to them.

The next point taken, which is the material point, is this—that this wall is not a building, structure, or erection within s. 75. Now, when we have to determine that question, it seems to me to be all-important to bear in mind what the object of these provisions is. The object of these provisions is this—to maintain in new streets a uniform line of frontage. It cannot, I presume, be said for one moment that any walls, whether high or low, are not buildings, structures, or erections. They obviously are such; but there are walls and walls. There is a wall of a certain height—two or three feet high—which would not in any way, I take it, disturb the uniformity of a street; then there are walls of a

(1) 61 L. J. (M.C.) 160.

greater height—twelve or fourteen feet, or even more—which would absolutely destroy the uniformity of that frontage, and absolutely defeat the purposes of these provisions. The question in every case is a question of fact, and a question for the magistrate to decide, namely, whether the wall in question is such a wall as to be a building, structure, or erection within the meaning of this Act—within the mischief of this Act. That is a question of fact for the magistrate to determine; it is a question of degree, and I think that is very well stated by Lord Coleridge in the case of *Ellis* v. *Plumstead Board of Works* (1), where he says: "I think, however, that the particular thing shewn to us in the photographs and plans in this case is such an erection as the section applies to. In saying that, I am not prepared to go the length of saying that every possible 'building, structure, or erection' which a man might put up for the purpose merely of ascertaining and bounding his own property from the public road would necessarily come within the section." Then he goes on to say that it is a question for the magistrate in each case; and, "In this case, as far as I can judge, the magistrate had to deal with something which he might very well find, upon the facts before him, to be a building, structure, or erection such as the section was intended to prevent."

In my opinion, these words exactly apply to the present case. I think, therefore, the decision of the Court below was right.

RIGBY L.J. I am of the same opinion. Long before the acts complained of there was in the City Road in this part of it a general line of buildings apparent to every one who passed through and along the road. Assuming for a moment that the wall which has been built is a boundary, structure, or erection within the meaning of s. 75, the appellants built that in front of the general line of buildings, and thereby committed an offence. It was quite right, therefore, for the London County Council to take out a summons, which they did on July 11, 1894, because an offence had been committed. I do not see that there is anything in Lord Selborne's speech in the House of Lords in *Spackman* v. *Plumstead Board of Works* (2) at all requiring that

(1) 68 L. T. 291. (2) 10 App. Cas. 229.

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there should be a certificate by the superintending architect as a condition precedent in regard to the offence committed or proceedings taken. The Act provides that he shall finally decide, but I think that that certificate, given two days after the taking out of the summons, quite fulfils the requirements of the statute. Well, then, this is not a case in which there is a mere boundary wall. It appears to be something far different from a boundary wall. We are asked, on the strength of the authority of *Wendon* v. *London County Council* (1), to say that a wall cannot be a structure. That appears to me to be very nearly approaching to an absurdity. I can quite see that the wall that was being built in that case was not a structure—it was only the commencement of a structure; it was not a completed wall—it was a wall that had been left half finished; it was the commencement of a structure, but not such a structure as would prevent the building that was actually completed afterwards from being a new structure. As regards the present one, I have no doubt at all about it. Ordinary boundary walls may be outside s. 75, and I think in practice they have been treated as being so: it is a question of degree in every case. If a man has a dwarf wall round a garden, or something of that kind outside the general building line—if that be the mere means of marking off his property to keep it private, and not substantially interfering with the general line of buildings, that may very well be outside s. 75; but if he builds a great wall, which is an interference with the uniformity of the street, that is as objectionable as an actual building for the purpose of habitation or use—such a thing, for instance, as a photographer's studio, or anything of that kind. If he builds a wall which is for all purposes as objectionable as that, I do not see why it should not be brought within s. 75. I have no doubt that this wall does fall within s. 75; and I think, therefore, that the appeal fails altogether and ought to be dismissed.

Appeal dismissed.

Solicitors: *Morgan & Upjohn; Blaxland.*

(1) [1894] 1 Q. B. 812.

M. W.

[IN THE COURT OF APPEAL.]

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Metropolis—Management Acts—Line of Building—Certificate of Superintending Architect—Corner House—Street in which Building is situate—Metropolis Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.

When an application is made to a magistrate under the Metropolis Management Act, 1862, s. 75 (1), for an order to demolish a building on the ground that it is beyond the line decided by the superintending architect to be the line of building of the street in which the building is situate, the question whether the building is in that particular street of which the line has been so laid down is to be decided by the superintending architect's certificate, and not by the magistrate to whom the application is made.

Barlow v. *Vestry of St. Mary Abbotts, Kensington* (11 App. Cas. 257), considered.

THIS was an appeal by John Allen & Sons from a decision of a Divisional Court (Wills and Wright JJ.) affirming a magistrate's order to demolish so much of a certain building as was

(1) 25 & 26 Vict. c. 102, s. 75: "No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, &c."

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beyond the general line of buildings in a road called Birchington Road.

Birchington Road runs into Kilburn High Road at right angles from the N.E. The appellants were owners of a plot of land forming the corner between these two roads, and situate on the N.W. side of Birchington Road. About November 13, 1894, the appellants began to erect four shops and dwelling-houses upon this piece of land. The one as to which complaint was made by the London County Council had a frontage of about fifty-eight feet to Birchington Road and about twenty-two feet to Kilburn High Road. On December 11, 1894, the superintending architect of the London County Council made his certificate, whereby, after reciting s. 75 of the Metropolis Management Act, 1862, and that the parties whom he named had appeared before him "regarding the erection of a building in Birchington Road, Hampstead, and beyond the face or front of the buildings forming a row of houses on the N.W. side of Birchington Road aforesaid," and that he had been required to decide the general line of buildings in such road as provided by the statute, he decided "that the main fronts of the buildings in the row of houses aforesaid, and tinted pink on the plan hereto annexed and signed by me, form the general line of buildings on the N.W. side of Birchington Road aforesaid, in which road the building in question is situate, and that the prolongation of the general line of buildings across such building is shewn by the pink dotted line on the annexed plan." The building in question extended on the side fronting Birchington Road sixteen feet beyond the general line of building determined by the certificate. Allen & Sons appealed to the tribunal of appeal constituted under s. 28 of the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), and the certificate was affirmed.

The London County Council then applied to a magistrate for an order to pull down so much of the building as was beyond the line. The magistrate made the order, but granted a special case asking the opinion of the Court on the questions—(1.) whether the certificate decided that the appellants' house was situate in the street, place, or row of houses in and for which the general

line of buildings was determined by the certificate; (2.) whether it was the duty of the superintending architect, under sect. 75 of the Act, to decide and find by his certificate the situation of the appellants' building, within the meaning of that section, and if so, whether his decision and finding were binding on the magistrate.

At the hearing before the Divisional Court, Wills J. said if the case were untouched by authority he should have thought that the question in what street a house was situate was a matter of fact to be decided by the magistrate. In *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (1), however, Lord Watson had given an unhesitating opinion that the point was to be decided by the architect; Lord Bramwell, an equally unhesitating opinion that it was to be decided by the magistrate; and Lord FitzGerald, without giving any reasons, had stated that he agreed with Lord Watson. Then, in *London County Council* v. *Cross* (2), in 1892, Denman and A. L. Smith JJ. decided that the architect was the judge. Their judgment was reversed on appeal on another ground, leaving this point open. Under these circumstances, the learned judge thought it was right to follow the opinion of Lord Watson and Lord FitzGerald, and of Denman and A. L. Smith JJ., rather than his own judgment. Wright J. concurred, saying that he did so solely in deference to the judgment of Denman and A. L. Smith JJ. The order of the magistrate was therefore affirmed.

Allen & Sons appealed.

July 19. *Channell*, Q.C., and *MacMorran*, for the appellants. In *London County Council* v. *Cross* (2) the Divisional Court decided two points: that the complaint was in time, and that the finding of the architect in what street the building complained of was situate, was final. The Court of Appeal reversed the decision on the first ground, leaving the other question open, whether it was for the architect or for the magistrate before whom the complaint came to determine in what street the building complained of was situate. The appellants contend that in the present case the architect, on the true construction

(1) 11 App. Cas. 257. (2) 61 L. J. (M.C.) 160; 66 L. T. 731.

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of his certificate, has not decided that point, and that, if he has, he has exceeded his jurisdiction. The Metropolis Local Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75 prescribes that the complaint must be proved to the satisfaction of the justices before whom the same is heard. The subject was considered in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (1). Lord Bramwell there expressed a clear opinion in favour of the view that the question is to be decided by the magistrate. Lord Watson is said to have given an equally distinct opinion the other way; but all his Lordship meant to say was that the architect might settle the length of the building line—so that, for instance, a batch of houses in a street which stood back might have a building line of their own distinct from the building line of other parts of the street—though his words, as reported, appear to go somewhat further. Lord Herschell's judgment is not against the appellants. It cannot be collected from it that he agreed with the opinion supposed to have been expressed by Lord Watson on this point, and Lord FitzGerald merely gives a general approval of the judgments of the Lord Chancellor and Lord Watson, without giving any reasons or addressing himself to this point in particular. The functions of the architect are merely to settle the building line with regard to existing buildings, not to decide where a building which is being commenced is situate. It is unreasonable to suppose that the owners of houses in a side street can, by putting their houses back, deprive an owner at the corner of a valuable frontage to the main street.

Horace Avory, and *Daldy*, for the County Council. A decision as to the general line of buildings involves the decision of the question in what line of buildings a building complained of is situate. The architect must, in coming to his conclusion, decide how many of the existing buildings are to be taken into account, and according to *Spackman* v. *Plumstead Board of Works* (2), he may fix the building line after the building complained of has been begun. If he is to decide how many of the existing buildings are to be taken into account, he must decide whether the corner houses are in the same row of houses or in the main street. It cannot have been intended that a magistrate should have power

(1) 11 App. Cas. 257. (2) 10 App. Cas. 229.

to review his decision. That would produce the confusion pointed out in *Barlow's Case*. (1) The observations of Lord Herschell (2), as to what the magistrate has to decide, may be qualified; according to *Spackman's Case* (3), he has not only to satisfy himself that the building is beyond the general line of buildings, but that there has not been the requisite consent. "The complaint is made, not of building beyond a certain line, but of building without the requisite consent." (4) The jurisdiction of the architect finally to lay down the building line was settled by *Spackman's Case* (3), and the observations of Lord Selborne (5) go on the principle that the magistrate is not to decide anything which the Act does not expressly give him authority to deal with. The decisions overruled by *Spackman's Case* (3) went a good deal on the ground of hardship; but the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), s. 28, constituted a tribunal of appeal the constitution of which was somewhat modified by the Act of 1894; so that it is now a tribunal to which no exception can be taken. The appellants have resorted to it without success, and have no reason for complaint on the ground of hardship. *Barlow's Case* (1) was decided on the ground that the architect had not decided that the house complained of was in De Vere Gardens. The case, in fact, goes on the ground that the architect's certificate was defective because it did not do what the appellants contend it was ultra vires to do. An argument from convenience is that cases of this kind cannot be settled without a view, and it cannot have been intended to make it a part of the duty of police magistrates to go about town taking views.

[LOPES L.J. referred to *Gilbart* v. *Wandsworth District Board* (6) as a case where the order of a magistrate who decided the point was upheld.]

It is a case of little authority; the question of jurisdiction was not argued.

Channell, Q.C., in reply.

Cur. adv. vult.

(1) 11 App. Cas. 257.
(2) 11 App. Cas. 263.
(3) 10 App. Cas. 229.
(4) 10 App. Cas. 237.
(5) 10 App. Cas. 238.
(6) 60 L. T. 149.

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1895. July 22. LINDLEY L.J. This is an appeal from a decision of a Divisional Court as to a building projecting beyond the line of street, and it turns upon the true construction of s. 75 of the Metropolis Management Act of 1862 (25 & 26 Vict. c. 102). The difficulty arises by reason of the building complained of being situate at the corner of two roads or streets. The superintending architect has granted a certificate which runs thus: it contains a recital that the parties interested have appeared before him "with regard to the erection of a building in Birchington Road, Hampstead, and beyond the face or front of the buildings forming a row of houses on the north-western side of Birchington Road aforesaid, and I have been required to decide the general line of buildings in such road as provided by the statute." Then he says, "Therefore I decide that the main fronts of the buildings in the row of houses aforesaid and tinted pink on the plan hereto annexed and signed by me form the general line of buildings on the north-western side of Birchington Road aforesaid in which road the building in question is situate." Having regard to the terms of that certificate and to the plan to which it refers, I have not the slightest doubt that on its true construction the building in question is certified to be situate in Birchington Road, the road delineated on the plan. That being so, I proceed to consider whether upon the construction of the Act the question whether the building complained of is situate in Birchington Road is to be decided by the superintending architect, or by the magistrate under s. 75.

Taking s. 75 as read, the following circumstances must co-exist in order to justify an order for demolition under s. 75, namely:— (1.) There must be a building, structure, or erection of some sort. (2.) Such building, structure, or erection must be erected without the written consent of the Metropolitan Board of Works (or now of the County Council). (3.) Such building, structure, or erection must be in some street, place, or row of houses. (4.) Such street, place, or row of houses must have a general line of building. (5.) This line of building—*i.e.*, the line of building of the street, place, or row of houses in which the building complained of is situate—must be decided by the superintending architect appointed by the Metropolitan Board of Works (or now

by the County Council). (6.) Lastly, the building, structure, or erection must be erected beyond the line so decided. What is left to the decision of the architect is the existence and exact position of the general line of building of the street, place, or row of houses (if any) in which the building, &c., complained of has been erected. In case of dispute the magistrate must decide all the other matters referred to—e.g., whether the building, &c., complained of is one to which s. 75 applies, especially having regard to s. 74; whether the necessary consent has been given; whether the building, &c., is in a street, place, or row of houses, "street" being interpreted as directed in s. 112; whether the building, &c., has been erected beyond the general line of building for that street, &c., as decided by the superintending architect. Such is, in my opinion, the true construction of the section, and of the decision in *Spackman* v. *Plumstead Board of Works* (1), which set at rest the doubt whether the magistrate could review the architect's decision as to the general line of building.

So far the interpretation of the statute is reasonably plain. But then it is said that the question still remains, who is to determine whether the building complained of is in the particular street, place, or row of houses to which the architect's certificate is applicable? This is the point on which Lords Watson and Bramwell differed in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington.* (2) A careful perusal of Lord Herschell's judgment has led me to the conclusion that he agreed with Lord Watson, and that Lord FitzGerald took the same view. There is much to be said for this interpretation of the Act; for, the object of the Act being to regulate lines of building, the architect, rather than the magistrate, seems naturally to be the person to say to what line of buildings a particular house should conform. The general line of buildings which the architect is to decide is "such general line," and by "such" is meant the general line for the street, &c., in which the house in question is. The architect might no doubt assume, without deciding, that the building complained of was in a particular street, place, or row of houses, and simply certify the general line of buildings of

(1) 10 App. Cas. 229. (2) 11 App. Cas. 257.

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that street, &c., leaving the magistrate to determine whether after all the building was in the street, &c., to which the certificate applied. But this would be to deprive the architect's certificate of half its value, and the interpretation which leaves him to decide what building line is to be conformed to, seems to be preferable to an interpretation which leaves that question to the magistrate. For these reasons, and thinking, as I do, that this view of the section is more in conformity with the decision of the House of Lords in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (1), than the interpretation contended for by the appellants, I have come to the conclusion that this appeal ought to be dismissed. The architect's certificate here, taken with the plan, supplies the omission which led to the decision in *Barlow's Case* (1), and does certify, with sufficient clearness, that the appellants' house is not only in Birchington Road, but is in the row of houses the building line of which is defined.

LOPES L.J. I am of the same opinion. There are two questions asked in this special case: The first is whether the certificate of the superintending architect decides that the appellants' house is situate in the street, place, or row of houses in and for which the general line of buildings is determined by the certificate. Now, I do not mean to say that the certificate is as clear as it might be; but I have come to the conclusion that it does mean to decide that the appellants' house is so situate. Therefore, I answer that question in the affirmative. Then a further question is asked: "Whether it was the duty of the superintending architect under the 75th section of the Act to decide and find by his certificate the situation of the appellants' building within the meaning of the said section, and if so, whether his decision and finding were binding on me." I have come to the conclusion that the answer ought to be in the affirmative. That question depends on the 75th section of the Metropolis Management Act, 1862. It is unnecessary to read that section, as it is fresh in our minds. You find in it these words: "Such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works."

(1) 11 App. Cas. 257.

The word "such" refers you back to the earlier part of the section, which says that "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate." It seems impossible that the superintending architect can determine the building line to which the building complained of must conform without determining in what street that building is. I think that if I had to decide the question for the first time, upon the true construction of the section I should so hold; but the case of *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (1), is clear in that direction. The judgment of Lord Watson in that case is right when he says (2): "In my opinion the function assigned to the superintending architect is, not merely to lay down the general line of buildings in a street, place, or row of houses in which the building or erection complained of is alleged to be situated, but to fix and determine the general building line of the street, place, or row in which, according to his professional judgment, such building or erection is actually situate. The question whether a building is or is not, within the meaning of the Act, situate in a particular street, place, or row, may involve considerations of the same character with those upon which the determination of a general line of buildings must often depend, and it appears to me to have been the intention of the legislature" (these are the important words) "to entrust the decision of both points to the architect, and not to the justice before whom the complaint is brought." That judgment of Lord Watson's is absolutely clear; and if the judgment of Lord Herschell, who delivered the first speech in the House of Lords, is looked at, it will be found that what he says is not inconsistent with anything Lord Watson says, but, in my opinion, is consistent with it; and when Lord FitzGerald's judgment is looked at what he says is this (3): "I have had the advantage of reading the judgment which has been delivered by the noble and learned Lord on the woolsack, and also the judgment which has been delivered by my noble and learned friend opposite" (Lord

(1) 11 App. Cas. 257. (2) 11 App. Cas. 265.
(3) 11 App. Cas. 269.

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Watson), "and I entirely agree in the conclusions at which they have arrived and in their reasoning." Now, it will be recollected that Lord Bramwell took a different view. Lord FitzGerald says nothing about the judgment of Lord Bramwell; but he says he agrees with Lord Herschell and Lord Watson. That case, therefore, concludes the question we now have to decide; and that being so, I answer the second question in the affirmative. It seems to me, as I have already said, not only is that in accordance with the case in the House of Lords, but in my mind it is in accordance with the true construction of the statute, and also what I conceive to be the general convenience of the matter, because there can be no doubt that the architect who goes on the spot and thoroughly considers the position of the house and has to determine the building line is the person who is best able to form a skilled opinion as to the particular street in which a particular house is situate. I therefore come to the conclusion that the decision of the magistrate was right.

RIGBY L.J. I am of the same opinion. As to the first question, I do not think the superintending architect's certificate is really open to doubt. In that certificate he speaks of a road called Birchington Road, and on the plan to which he refers Birchington Road is shewn to be a road extending all the way from Kilburn High Road on the one hand to the West End Lane on the other. He decides that the house in question is in Birchington Road, and he decides what is the general line of buildings in Birchington Road. If there were any doubt about this, it would be set at rest by the plan, in which we see the general building line indicated passing through the houses in question right up to Kilburn High Road. I have no doubt, therefore, that his certificate is a good certificate in the very respect in which in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (1), the certificate was held to be defective. I quite agree with what has been said as to the construction of sect. 75; but I will not go into that, for I consider the matter to be absolutely settled and disposed of by the decision in that case. Bacon V.-C. had made an absolute injunction restraining the vestry from proceeding to pull down

(1) 11 App. Cas. 257.

the building. That would have left open no possibility of their instituting new proceedings. The House of Lords affirmed that order, "with the variation that the injunction therein granted should be limited to restraining the respondents, the Kensington Vestry, from demolishing or interfering with the buildings in question or taking any steps for that purpose in virtue either of the certificate of Mr Vulliamy or of the complaint and proceedings following thereon." So that in point of law they simply found that the certificate of Mr. Vulliamy and the complaint and proceedings following thereon did not form a ground for demolishing the building. Lord Bramwell, indeed, said on p. 269: "I hold as a fact that the appellant's house is not within any row or line of buildings in De Vere Gardens." But if the House of Lords had jurisdiction, or supposed themselves to have had jurisdiction, to determine that point, they ought to have determined it. It would have been idle to leave the case open to future litigation when they had all the materials before them for deciding it at once; but I do not find that any one of the noble and learned Lords who moved the House or spoke on the motion on that occasion, other than Lord Bramwell, takes upon himself to determine the point. Now, if it were the magistrate's duty to determine that point, an appeal would lie, and the House of Lords ought to have determined whether the house was within or without De Vere Gardens. They refrained from doing so; and I think in so refraining they decided that it was not the duty of the magistrate but of the architect to ascertain in what line of buildings the house in question was situate, and that his certificate was defective in that he had not so ascertained it. It appears to me a clear decision upon the very point that has been argued before us, and I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Last & Sons; Blaxland.*

H. C. J.

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[IN THE COURT OF APPEAL.]

BROWN, SHIPLEY & CO. *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Marketable Security—Promissory Note—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-s.* 1 (*b*); *s.* 122.

An American railway company, as security for a temporary loan, handed through their agents in England to the lender an instrument which stated that for value received they promised to pay twelve months after date to the order of themselves the amount named in it. It also contained a statement that it was one of a series, and was secured by a deposit of gold bonds which (or a sufficient amount of their proceeds) were under an existing trust deed to be held in trust for the benefit of the holders of the instruments. The instruments, which had been indorsed before issue, were dealt in upon the London Stock Exchange, but were not officially quoted there:—

Held, reversing the judgment of a Divisional Court (ante, p. 240), that the instrument was not a mere promissory note; that it contained a contract that the holder should be entitled to the benefit of the security mentioned in it; that it was, therefore, a security for the money lent upon it, and that it required to be stamped as a "marketable security" within the meaning of s. 82, sub-s. 1 (*b*), and s. 122 of the Stamp Act, 1891.

APPEAL of the Commissioners of Inland Revenue from the decision of a Divisional Court (Grantham and Charles JJ.) (1) upon a case stated by the commissioners under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13. The facts are fully stated, and the instrument alleged to be liable to stamp duty as a marketable security is set out at length, in the report of the decision of the Divisional Court.

Sir R. E. Webster, A.-G., and *Danckwerts*, for the commissioners. The instrument is something more than a mere promissory note: it is a "marketable security" within the meaning of s. 82, sub-s. 1 (*b*), and s. 122 of the Stamp Act, 1891 (2), and the

(1) Ante, p. 240.

(2) By 54 & 55 Vict. c. 39, s. 82, sub-s. 1 (*b*), marketable securities for the purpose of the charge of duty thereon include a marketable security made or issued by or on behalf of a foreign company, which, though originally issued out of the United Kingdom, has been or is, after August 6, 1885, delivered to a subscriber in the United Kingdom.

By s. 122, unless the context otherwise requires, the expression "marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom.

commissioners are entitled to charge it as such with a higher rate of duty than that imposed upon promissory notes. First, it is a security: it gives the holder a charge upon the gold bonds, the principal and interest of which are guaranteed by the railway company, the borrowers, and which under the agreement between the railway company and Brown, Shipley & Co. are held in trust by the latter for the holders of these instruments. It may be that the charge is originally created by that agreement; but the statement in the instrument itself, that the bonds or their proceeds are to be held in trust "for the benefit of the holders hereof," shews clearly that only the holders of these instruments are entitled to share in the security, and that the instruments are the holders' documents of title. Supposing that the trust deed had never in fact been executed, the railway company could be compelled to carry out the representation, amounting in equity to a contract, contained in this instrument. Admitting that the document is not described as a "debenture" and does not contain the word "charge," it is the substance and character of the document itself, and not the mere words used, which must be looked at in order to determine whether it gives the holder a security. Secondly, if the instrument is a security, it is a "marketable security," for it is not only "capable of being sold in any stock market in the United Kingdom" within the meaning of s. 122 of the Stamp Act, 1891, but instruments of the series have actually been sold upon the London Stock Exchange.

[They cited *Ross* v. *Army and Navy Hotel Co.* (1); *Edmonds* v. *Blaina Furnaces Co.* (2); *Levy* v. *Abercorris Slate Co.* (3); *Texas Land and Cattle Co.* v. *Commissioners of Inland Revenue* (4); *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue.* (5)]

Bremner (*Finlay, Q.C.*, with him), for Brown, Shipley & Co. The instrument is properly stamped; it is a promissory note and nothing more. It commences in the usual form of a promissory note, and it is described as a "note" on its face. The latter portion is a mere statement of the fact that bonds have been

(1) 34 Ch. D. 43.
(2) 36 Ch. D. 215.
(3) 37 Ch. D. 260.
(4) 16 Court Sess. Cas. 4th Series, 69; 26 Sc. L. R. 49.
(5) 7 Q. B. D. 165.

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deposited to secure the loan; it is a representation only and not a contract to give a charge which would be enforceable in equity. The mere fact that a promissory note contains a statement of facts not necessary to its validity as such does not make it any the less a promissory note: *Fancourt* v. *Thorne*. (1)

LORD ESHER M.R. I am of opinion that this appeal should be allowed. The first point that requires notice is that a document can only be stamped in respect of that which is on its face; if it is necessary to go to any other document in order to ascertain part of the right of the holder, the stamp in respect of the whole of such right cannot be put on the first document, for the two documents are not connected together. The question for us is, therefore, whether there is upon the face of this document something which brings it within the definition of a marketable security. There can be no doubt that it is a promissory note; it contains an unconditional promise to pay money, and it is given in respect of money advanced. But it may be a promissory note and something more, and that something more, if it is to affect the liability to stamp duty, must be on its face. What in the present case is that additional matter? It is contended for the respondents that it is nothing but a statement or representation, and there is no doubt that it is both; but is it not such a representation as carries with it a promise? It is in my opinion a representation made to the person who is to lend the money, and is intended to induce him to rely upon it as a statement that he will have the security contained in the trust deed. It is therefore made to him in order to induce him to believe that he has a right to the security, and in consequence of it he does believe that he has that right. In my judgment, that is a contract both at law and in equity that he shall have that right, and its effect is to make this document not merely a promissory note, but a promissory note with an additional promise that the holder shall have security; the document is therefore a security. Then, is it a "marketable security" within the definition in the statute? The expression "marketable security" has been judicially explained by Lord Shand in *Texas Land and Cattle*

(1) 9 Q. B. 312; 15 L. J. (Q.B.) 344.

Co. v. *Commissioners of Inland Revenue* (1) as meaning "securities of such a description as to be capable, according to the use and practice of stock markets, of being there sold and bought." That definition, which I adopt, has been satisfied in the present case, and I have no doubt that this instrument is a marketable security, and liable as such to the higher duty.

KAY L.J. I entirely concur with the judgment of the Master of the Rolls, and should add nothing if we were not differing from the Court below. The question is whether this instrument is a marketable security within the meaning of the Stamp Act, 1891. That Act provides for stamps on promissory notes, for stamps on debentures, for stamps on mortgages, and for stamps on marketable securities. In s. 82 it deals with marketable securities issued by or on behalf of foreign companies, and s. 122 defines "marketable security" as a security of such a description as to be capable of being sold in any stock market in the United Kingdom. The first question is, whether this instrument is a promissory note. No doubt it begins like a promissory note, and the first part of it is in fact a promissory note; but what is the meaning of the latter part of the instrument? Is it or is it not a contract to give the man who buys it a security for his money? He buys it on the faith of that statement—a statement that he shall have a share with the other holders of these instruments in that security which it describes. If that is not a contract, I do not know the meaning of the word. Try it in this way. By nothing except that which appears upon the face of this instrument is the holder entitled to the benefit of a share in that security; but by this instrument he is so entitled, and if the principal were not paid at maturity, or if the interest fell into arrear, he might bring an action on behalf of himself and all the other holders of the series of instruments to have that security realized for their benefit. But he can only do that by virtue of that which is on the face of this instrument, which must therefore be a contract with him that he is to be entitled to share in the benefit of the security. That the holder would have such a right of action has been proved in innumerable instances by the

(1) 16 Court Sess. Cas. 4th Series, 69; 26 Sc. L. R. 49.

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holders of what are called debentures of a joint stock company. The ordinary form of such a debenture begins with a promise to pay, and it goes on to give a charge in addition to that promise to pay, and the holder of one of these debentures is entitled at once when the debenture becomes due and payable to bring such an action as I have described. This right arises by virtue of the contract on the face of the debenture; for the holder is no party to the covering mortgage except by reason of the contract with him which the debenture on the face of it contains. But I may go further than that. In a case in the Court of Appeal of *Ross* v. *Army and Navy Hotel Co.* (1), the debenture was in the form of an agreement under the seal of the company to pay the bearer on a certain day the sum of 100*l.* and interest, and was issued subject to the conditions indorsed upon it, one of which was that the holders of the bonds of that issue were entitled *pari passu* to the benefit of a certain trust deed, the nature of which was then set out. In that case the covering deed was void, because it contained an assignment of furniture and chattels, and was not registered under the Bills of Sale Act, 1882; but, nevertheless, the Court held that the debenture on the face of it, by reason of the condition that was placed there to induce people to buy it, contained a contract to give a charge upon all the property of the company, which contract was enforceable notwithstanding that the covering deed was void. That decision goes much further than we need go in the present case. Here the covering deed is good; the bonds have actually been deposited with Brown, Shipley & Co., and are held in their hands in trust for the benefit of the holders of this instrument and the other instruments of the series, and I can see no answer to an action to enforce the security. This instrument is therefore, in my opinion, not merely a promissory note, but it is a promissory note containing a contract by which the holder has security. The first part of the definition in the Stamp Act is answered, and the instrument is a security.

The only other question is whether it is a "marketable security," which expression is defined in s. 122 as a security "capable of being sold in any stock market." On the face of

(1) 34 Ch. D. 43.

the case it appears that these instruments are not only capable of being sold, but that instruments of this series have actually been dealt in on the London Stock Exchange, so that the instrument is clearly capable of being sold. Both parts of the definition are therefore answered. The instrument is a security and it is marketable. If it is a marketable security, why should it be stamped as a promissory note only? A promissory note means a promissory note simply, and the stamp on a promissory note is less than that on a marketable security. The Inland Revenue authorities wish to stamp it with the higher stamp which they are entitled to put on a marketable security, and I see no answer to their claim. With all respect for the learned judges in the Court below, whose attention was not called to the case of *Ross* v. *Army and Navy Hotel Co.* (1), I differ from them entirely in holding that this document was nothing but a promissory note; I think it was also a security, and a security which was marketable.

A. L. SMITH L.J. I am of the same opinion. The ratio decidendi of the Divisional Court is to be found at p. 245, where Charles J. says: "If I had been able to come to the conclusion that the latter part of this document did constitute some contractual relation between the holder of the note and the railway company, different considerations might have been applicable; to my mind, however, the latter part is nothing more than a notice to the holders of this promissory note that it has been secured in the manner therein specified, and does not constitute any additional promise on the part of the makers." With that passage I cannot agree. That the first part of the document is a promissory note I do not doubt; but the first question for us is, is it not a promissory note and something more? I cannot read the last part of the document without seeing that it is a representation by the company to the holder that if he will give 2000*l.* for this piece of paper there is a security for that 2000*l.* in a deposit of first mortgage bonds, which are to be held in trust for him. That is a representation made by the company to the intending buyer in order to induce

(1) 34 Ch. D. 43.

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him to advance his money, and upon the faith of which he acts; in my judgment, therefore, it is a representation which binds the company and forms a contract on their part that these first mortgage gold bonds exist, and that they are the security for his money. There is a contractual relation over and above the bare promise to pay by the company, and it is on this point that I differ from the Court below. This document is a promissory note and something more—it is a security. Is it then a marketable security, that is, a security capable of being sold in the stock markets? Upon that the finding of the case is that instruments of the series have been from time to time dealt in on the London Stock Exchange, though not quoted there. The instrument is, therefore, clearly capable of being sold in any stock market in the United Kingdom, and is a "marketable security" within the meaning of the Act.

Appeal allowed.

Solicitor for Commissioners of Inland Revenue: *Solicitor of Inland Revenue.*

Solicitors for Brown, Shipley & Co.: *Ashurst, Morris, Crisp & Co.*

W. J. B.

C. A. 1895 *July* 16.

[IN THE COURT OF APPEAL.]

METROPOLITAN COAL CONSUMERS' ASSOCIATION *v.* SCRIMGEOUR.

Company—Issue of Shares—Commission to Stockbrokers—Act ultra vires.

The payment by a limited company of a reasonable amount of money to brokers by way of commission or brokerage for placing shares is not an act ultra vires the company.

In re Faure Electric Accumulator Co. (40 Ch. D. 141) distinguished.

APPEAL from the decision of the Divisional Court (Wright and Day JJ.), which affirmed a judgment of the Mayor's Court, London, in favour of the defendants.

The Metropolitan Coal Consumers' Association was incorporated in January, 1889, under the Companies Acts, as a limited com-

pany, with a capital of 250,000*l.*, divided into 50,000 ordinary shares of 1*l.* each and 20,000 preference shares of 10*l.*

The memorandum of association stated that it was one of the objects of the company, "To pay out of the funds of the association all brokerages, commissions, legal and other expenses for the issuing of the capital and in respect to the formation of the association."

The articles of association provided for the appointment of a council of administration from whom should be elected an executive and finance committee, who should constitute the board and have and execute all the powers commonly vested in directors.

The 113th article provided as follows: "The business of the association shall be managed by the board, who may pay all brokerages (if any) payable in respect of the placing any of the shares in the association."

In pursuance of those powers the board agreed with the defendants, who were a firm of stockbrokers, to pay them a commission of 2½ per cent. on the nominal value of the shares, for procuring applications for the shares which they desired to issue. The defendants accordingly issued prospectuses and forms of application and obtained a considerable number of applications for shares, which they sent in to the company, the forms being stamped with the name of the defendants' firm.

The board paid the defendants a commission on the shares so placed by them which amounted to 26*l.* 10*s.*

The association was ordered to be wound up on January 20, 1890. On August 24, 1894, the official liquidator brought the present action in the name of the company in the Mayor's Court, London, claiming a return of the sum of 26*l.* 10*s.*, as being money paid without consideration and ultra vires by the association to the defendants. The recorder gave judgment for the defendants; and the plaintiff company appealed from his decision to the Divisional Court, who affirmed the decision of the recorder. The plaintiff company again appealed.

Swinfen Eady, Q.C., and *Quin*, for the plaintiffs. The action of the company in paying a commission or brokerage for placing the shares was beyond the powers of a registered company. It

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has been expressly decided that a company has no power to issue its shares at a discount, and the payment of a commission to brokers amounts to the same thing: the company does not obtain the full nominal value of the shares. It is in effect reducing the capital of the company. Therefore, although it may be permitted by the articles of association, it is illegal as contravening the principle of the Companies Acts: *In re Faure Electric Accumulator Co.* (1); *Ex parte Audain* (2); *Lydney and Wigpool Iron Ore Co.* v. *Bird* (3); *In re Almada and Tirito Co.* (4); *Trevor* v. *Whitworth* (5); *In re Ooregum Gold Mining Co.* (6)

Jelf, Q.C., and *A. T. Toller*, for the defendants, were not called on.

LINDLEY L.J. This is an attempt to push some sensible and well-recognised doctrines of this Court to an absurdity. The law is clear that limited companies cannot issue shares at a discount. What is the meaning of that? The meaning of that is that shares cannot be issued upon terms which are inconsistent with the provisions of the statutes relating to limited companies; or, in other words, the statutes having said that every holder of a share shall pay so much for it, the company cannot issue the share upon the terms that the shareholder shall pay less. That is the whole of the theory of issuing shares at a discount.

Now, how can what this company has done be said to be issuing shares at a discount? The transaction here is this: the company have authorized their directors to pay brokers a fair and reasonable commission for their services in procuring people to take shares. What is there contrary to the Act of Parliament in that? What is there illegal in that in any sense or shape? I confess I cannot see the slightest sign of any such thing. That it may be so manipulated as to lead to the issue of shares at a discount is possible, and when such a case arises we will deal with it; but there is nothing of the sort here. I do not myself attach the slightest importance to the clause in the memorandum of association: that clause saying it shall be one of the objects of

(1) 40 Ch. D. 141.
(2) 42 Ch. D. 1.
(3) 31 Ch. D. 328; 33 Ch. D. 85.
(4) 38 Ch. D. 415.
(5) 12 App. Cas. 409.
(6) [1892] A. C. 125.

the company to pay brokers is to my mind quite out of place: it is an authority to the directors to apply the money of the company in that way if the directors in their judgment should think it expedient; but to suppose that the clause is any the better for being in the memorandum of association instead of in the articles would be a grievous legal mistake; the directors are authorized to do it, and they have done it. It is said not only that the directors are liable for misapplying the funds of the company, but that the recipients of the money are liable. That is a step further than any case has gone yet. I do not mean to say that a company cannot maintain an action at law to recover money which is its own, if it is improperly in the hands of other people. I daresay it can; but I am addressing myself to the root of this question, not to the question of remedy, whether it is legal or equitable, but to the question whether there is anything wrong or ultra vires in what has been done, and I cannot come to the conclusion that there is anything wrong in it at all. My brothers suggested the case during the argument of paying newspapers for advertising a company, and Mr. Quin felt that the analogy was rather close, and he went the whole length of saying that such a payment would be an illegal payment, and that the company could recover back from the newspapers money paid for advertisements. All I can say is, it startles me to hear any such doctrine. No Court has ever sanctioned such a theory, and I do not suppose any Court will. But then it is contended that the case has been decided by Kay J. in *In re Faure Electric Accumulator Co.* (1), and also by this Court in *Lydney and Wigpool Iron Ore Co.* v. *Bird.* (2) Now, as regards the last-mentioned case, although there is that expression on page 95 to which Mr. Swinfen Eady refers, and to which I stand, it has application, of course, to the circumstances of that case; and the circumstances of that case have not the slightest resemblance to the circumstances in the present case. The money there sought to be recovered was not money which was paid by the company for placing shares. There was a person named James Bird, who was a promoter of the company, and he secretly made a profit at the expense of

(1) 40 Ch. D. 141. (2) 33 Ch. D. 85.

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the company of 10,800*l.* He was made liable for it. He said, "Well, but I have spent 5000*l.*, as a consideration which I gave to William Bird for guaranteeing me that shares should be taken up in this company," and we disallowed James Bird that bill. The whole thing was a juggle from beginning to end, and we disallowed it on the ground that it was an improper transaction—and so it was. It has nothing whatever to do with, and is far away and remote from, such a case as this, where there is no juggle and no impropriety at all. As regards *In re Faure Electric Accumulator Co.* (1), no doubt Kay J. did apparently hold that these brokerage payments were illegal, being paid out of capital, certainly, and he made the directors there liable for them. If that decision is understood as going as far as to compel us to hold that these payments are illegal, I should say that I dissent from it, and it goes a great deal too far. I doubt very much, if you look at the facts, whether the learned judge did intend to go as far as that. I doubt whether he regarded the commissions there as ordinary commissions of a reasonable amount, payable in the ordinary course of business. I think he treated them rather as improper payments, rather in the shape of bribes, and of course, if he took that view, he was perfectly justified in holding the directors liable to replace the money which they had so misapplied. It appears to me that there is neither principle nor authority to support this appeal, and it must be dismissed with costs.

LOPES L.J. I am of the same opinion. It is said that these payments of commission to brokers for issuing shares of the company are ultra vires, and therefore illegal. Now, so far as I can ascertain, no case hitherto seems to have gone that length. The case chiefly relied upon was *In re Faure Electric Accumulator Co.* (1); but that case is different, and the learned judge, Kay J., proceeded upon different grounds. He was of opinion that the payments of commission to brokers there were not bonâ fide payments for work and labour done—that they were not payments in the ordinary way of business, but rather in the nature of bribes. I do not think for one moment that he re-

(1) 40 Ch. D. 141.

garded the payments there in the same light as we are justified in regarding the payments here, for it is not contended here that these payments to the brokers at any rate were not bonâ fide and honest, and were really made in respect of services rendered.

In the result, as regards these payments I come to this conclusion—that in any case where it is made out that the services of the broker are reasonably necessary, that the brokers are properly employed in the issue of the capital of the company, and that the payment of a commission of so much per share is a fair and just payment for services rendered, there is no ground, either of reason, of justice, or of principle, why the payment should not be held to be intra vires and unimpeachable.

The decision of the Court below was right, and this appeal must be dismissed.

RIGBY L.J. I am of the same opinion. I do not think that there is anything in the case of *Lydney and Wigpool Iron Ore Co.* v. *Bird* (1) that would at all justify the decision that we are asked to arrive at in this case. There a sum of 10,800*l.* of concealed property was taken by a promoter out of the capital of the company, under an appearance which was different from the reality, that appearance being that it was bonâ fide purchase-money; and the only question was—could he be allowed out of that a sum he paid to his brother for guaranteeing shares: an absolutely different case from the present.

With reference to *In re Faure Electric Accumulator Co.* (2), I observe that that case is a very peculiar one in some respects. First of all, the man who cast doubt on this company in the case was the broker himself, Pincoffs, who apparently had in his pocket an offer from his client Morris to take shares: I say "apparently"—I think that was the fact in the case. I do not think he could have been successful in going off for a client and getting him in so short a time; and for that work he got paid upwards of 2000*l.* No doubt, looking at it as a percentage on the nominal value of the shares, that might not be outrageous; but to suppose that a company can fairly pay upwards of 2000*l.* for work in that way and call it commission is

(1) 33 Ch. D. 85. (2) 40 Ch. D. 141.

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at any rate a very different state of things from that which we have to deal with here, where there was actual work done in respect of the shares, and where the brokers were paid what appears to be shewn, or is allowed to be, an ordinary brokerage for the work that they did. I confess I am not prepared to hold that any expenditure of a company with a view to having its capital placed is necessarily wrong. If you can place the capital by way of advertisement, I do not see why you cannot incur in the regular way of expenditure any brokerage to brokers to procure the applications.

I think, upon that ground, the action altogether fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Lumley & Lumley; H. B. Wade.*

M. W.

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[IN THE COURT OF APPEAL.]

BAYNES & CO. *v.* LLOYD & SONS.

Landlord and Tenant—Sub-lease—Implied Covenant for Title or for Quiet Enjoyment—Duration of Covenant.

The defendants being possessed of a term of years in a house, of which term there were eight and a half years then unexpired, by indenture sub-let the premises to the plaintiffs for a term of ten and a half years, acting under a mistake, but in good faith. The sub-lease did not contain any express covenant either for title or for quiet enjoyment, nor did the words of letting include the word "demise." The plaintiffs occupied the premises until the end of the eight and a half years, when they were evicted by the defendants' superior landlord. The plaintiffs having brought an action for breach of implied covenants for title and for quiet enjoyment:—

Held, that, assuming that in the absence of the word "demise" either of such covenants could be implied in the lease, the duration of the covenant was limited by that of the lessor's own estate, and that consequently the plaintiffs could not recover.

APPEAL from the decision of Lord Russell of Killowen C.J. (1) By an indenture under seal dated March 31, 1885, the defendants leased to the plaintiffs certain premises for the term of ten and a half years less one day from March 25, 1885, at

(1) [1895] 1 Q. B. 820.

a yearly rent. The operative words of the lease were, "the landlords agree to let and the tenants agree to take"; the word "demise" was not used, nor did the lease contain any express covenant for title or for quiet enjoyment. The defendants had only a leasehold interest in the premises, which expired on September 29, 1893, two years before the expiration of the term granted by them to the plaintiffs. In granting the sub-lease to the plaintiffs, the defendants acted under a bonâ fide mistake and in good faith. After September 29, 1893, the defendants' superior landlord commenced an action against the plaintiffs to recover possession of the premises, and the plaintiffs were evicted. The plaintiffs then brought this action against the defendants, their lessors, to recover damages for breach of implied covenants for title and for quiet enjoyment. Lord Russell of Killowen C.J. held that no covenant for title could be implied in the lease, and that, though a covenant for quiet enjoyment was to be implied, it enured only during the continuance of the interest of the lessors; he therefore gave judgment for the defendants. The plaintiffs appealed.

July 13. *English Harrison*, and *Leck*, for the plaintiffs. From the relation of landlord and tenant, and also from the language of the lease, covenants by the defendants for title and for quiet enjoyment are implied, and those covenants are not limited to the duration of the defendants' own estate. Such covenants would be implied from the use of the word "demise" in the lease: Sheppard's Touchstone, pp. 160, 165, 272; *Holder* v. *Taylor* (1); *Line* v. *Stephenson* (2); *Mostyn* v. *West Mostyn Coal and Iron Co.* (3); and a covenant for quiet enjoyment may be implied even in a parol demise: *Baudy* v. *Cartwright*. (4) Although the word "demise" is not used in the present lease, the word "let" is of equal force: *Hart* v. *Windsor* (5), per Parke B. The words "agree to let" imply an intention on the part of the lessors that the lessees shall have possession of the premises for the term for which the lessors purport to grant

(1) Hob. 12.
(2) 5 Bing. N. C. 183.
(3) 1 C. P. D. 145, 152.
(4) 8 Ex. 913.
(5) 12 M. & W. 68, 85.

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them. The case of *Adams* v. *Gibney* (1), which at first sight seems in favour of the defendants, is distinguishable; that decision depended upon the fact that there was no breach of covenant during the life of the lessor, who was only a tenant for life. [They also cited *Burnett* v. *Lynch* (2); *Hall* v. *City of London Brewery Co.* (3); *Stranks* v. *St. John.* (4)]

Swinfen Eady, Q.C. (*H. Sutton* with him), for the defendants. The implication of a covenant for title or for quiet enjoyment does not arise from the relation of landlord and tenant, but from the express words used by the parties. Even if the word "demise" had been used, the authorities shew that at the most a qualified covenant for title would have been implied, not an absolute covenant, and that where that word is not used no covenant for title can be implied at all. In the present case the utmost that can be implied is a covenant for quiet enjoyment, and that covenant would expire with the determination of the lessor's estate. Even where a covenant is implied from the use of the word "demise," its duration is limited to the duration of the term of the lessor: *Swan* v. *Stransham* (5); *Adams* v. *Gibney* (6); and an implied covenant for quiet enjoyment where the premises are "let" and not "demised" is equally limited to the duration of the lessor's interest: *Penfold* v. *Abbott.* (7) There is no authority for the dictum of Parke B. in *Hart* v. *Windsor* (8), that the same covenants may be implied from the use of the word "let" as from "demise." [They also cited *Andrews' Case* (9); *Bragg* v. *Wiseman* (10); *Williams* v. *Burrell* (11); *Schwartz* v. *Locket.* (12)]

English Harrison, in reply.

Cur. adv. vult.

July 30. The written judgment of the Court (Lord Esher M.R. and Kay and A. L. Smith L.JJ.) was delivered by

Kay L.J. The plaintiffs sue in this action for damages for eviction from a house of which they were tenants to the

(1) 6 Bing. 656.
(2) 5 B. & C. 589, 609.
(3) 2 B. & S. 737.
(4) L. R. 2 C. P. 376.
(5) Dyer, 257 a.
(6) 6 Bing. 656.
(7) 32 L. J. (Q.B.) 67.
(8) 12 M. & W. 85.
(9) 2 Leon. 104; Cro. Eliz. 214.
(10) Brownl. 22.
(11) 1 C. B. 402.
(12) 61 L. T. 719.

defendants. The tenancy was created by a lease under seal dated March 31, 1885. The operative words of the lease were, the defendants "agree to let." The term was ten and a half years from March 25, 1885. The defendants had only a leasehold interest, which expired on September 29, 1893. The superior landlord after that date evicted the plaintiffs. The lease to the plaintiffs did not contain any express covenant for title or for quiet enjoyment, nor was the word "demise" used in it. The plaintiffs insist that there should be implied a covenant for title, or at least for quiet enjoyment, and that such covenants, or one of them, was broken by the eviction by title paramount.

These facts raise the following questions: 1. Can any covenant be implied in this case? 2. If any, is such covenant one for title, or only for quiet enjoyment? 3. Is such implied covenant an absolute covenant, or is it the ordinary limited covenant? 4. Whatever it was, did it not come to an end with the determination of the lessor's estate?

With reference to the first question, the law is thus stated in Sheppard's Touchstone, at p. 165: "If one make a lease for years of land by the words 'demise or grant' and there is not contained in the lease any express covenant for the quiet enjoying of the land; in this case the law doth supply a covenant for the quiet enjoying of it against the lessor, and all that come in under him by title during the term. . . . . But where there is an express covenant in the deed for the quiet enjoying of the land, there the law will not make this implied covenant." The learned author goes on to say that in the case of a lease for life reserving rent the law creates a warranty against all men, and this notwithstanding a warranty expressed in the deed. *Nokes's Case* (1) is to the same effect. In this statement of the law three things are noticeable: (1.) That the implication arises not from the mere relation of landlord and tenant, but from the use of the words "demise or grant"; (2.) That the covenant implied is for quiet enjoyment, not a covenant for title; and (3.) That it is a limited covenant, "against the lessor and all that come in under him by title." At pp. 271, 272 of the Touchstone it is said that the most usual and proper words for making a lease are "demise

(1) 4 Rep. 80 b.

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grant and to ferme let," but that other words—"whatsoever word will amount to a grant"—such as "give betake or the like," will make the lease; but it is not said that there is any implication of a covenant from any of those other words. In Com. Dig. Covenant, A 4, it is stated that in a lease for years covenant lies upon the word "demisi" or "concessi," and covenant for rent on the word "reddendo" rent. In Viner's Abridgement, Covenant, F, "Action of covenant lies upon the words demise and grant in an indenture of lease, though there are no other words comprehending a warranty in them." In Bacon's Abridgement, Covenant, B, "There are some words which of themselves import no express covenant, yet being made use of in certain contracts they amount to such, and are therefore called covenants in law and will as effectually bind the parties as if expressed in the most explicit terms. As if a man makes a lease for years of land by the words 'concessi' or 'demisi' these import a covenant." In *Nokes's Case* (1) it is said there is a covenant in law on the words "demise, grant, &c."

All these citations are inconsistent with the view that a covenant can be implied from the mere relation of landlord and tenant, or from any words constituting that relation other than the particular words referred to. And this state of the law seems to be recognised by 8 & 9 Vict. c. 106, which in s. 4 provides that the words "give" or "grant" in a deed shall not in future imply any covenant at law, but does not take away that effect from the word "demise" in a lease for years.

On the other hand is cited a dictum of Parke B. in *Hart* v. *Windsor* (2): "It is clear that from the word 'demise' in a lease under seal the law implies a covenant, in a lease not under seal a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let' or any equivalent words (Shep. Touchstone, 272) which constitute a lease have no doubt the same effect, but not more: Shep. Touchstone, 165, 167." This dictum was cited in the judgment in *Mostyn* v. *West Mostyn Coal and Iron Co.* (3)

(1) 4 Rep. 80 b. (2) 12 M. & W. 85.

(3) 1 C. P. D. 145.

This statement of the law professes to be founded upon Sheppard's Touchstone. But in that book it is not said that the covenant is implied from any words sufficient to make a lease, only from certain words; nor does the implied covenant, according to that authority, extend to an eviction by title paramount, but it is only the ordinary limited covenant for quiet enjoyment.

In *Bandy* v. *Cartwright* (1) the lease was by parol; it was held that a covenant for quiet enjoyment during the term could be implied, and further, that such covenant was broken by a distress for a rent-charge granted before the parol demise by a predecessor in title of the lessor under whom he claimed by purchase. The reason for this decision is not given in the report. Probably this parol lease was made by the word "demise," or, in the absence of evidence, that was assumed to be the case. The decision was followed in *Hall* v. *City of London Brewery Co.* (2)

The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease.

But, supposing any covenant could be implied, according to Sheppard's Touchstone it is a covenant for quiet enjoyment only; this is stated to be the law also by Lord Eldon in *Iggulden* v. *May*. (3) In *Holder* v. *Taylor* (4) a lease for years was made by the word "demise," and the lessee brought an action of covenant against the lessor because at the date of the lease the lessor was not seised of the land, but a stranger. The lessee had not been ejected; but the Court was of opinion that the action would lie, "for the breach of the covenant was in that the lessor had taken upon him to demise that which he could not, for the word 'demisi' imports a power of letting. . . . . But if it were an express covenant for quiet enjoying, there perhaps it were otherwise." The case is very shortly reported, and the words quoted seem in the former sentence to intimate that the implied covenant is a covenant for title; but this is contradicted by the last words referring to an express covenant for quiet enjoyment as rebutting the implication. In *Burnett* v. *Lynch* (5) it was

(1) 8 Ex. 913.
(2) 2 B. & S. 737.
(3) 9 Ves. 325.
(4) Hob. 12.
(5) 5 B. & C. 589, at p. 609.

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said by Littledale J. that the word "demise" "imports a covenant in law on the part of the lessor that he has good title and that the lessee should quietly enjoy during the term"; but he does not cite any authority for this. In *Line* v. *Stephenson* (1), it is admitted somewhat doubtfully by Tindal C.J. that the word "demise" may import a covenant for title as well as for quiet enjoyment; but it is put by Alderson B. that it is a fallacy to say it imports two covenants; it imports one, of which either want of title or eviction would be a breach.

The case of *Stranks* v. *St. John* (2) was referred to, in which there was an agreement in writing to let for seven years. This, by 8 & 9 Vict. c. 106, could not be a lease for seven years, because it was not a deed. It was, therefore, treated as an agreement to grant a lease by deed, under which the intended lessee would be entitled to investigate the lessor's title, if he had not waived that right. The action seems to have been brought by the lessee on an implied contract to make a good title, the breach alleged being that the lessor never had any right or title to let for the term. Willes J. said, in his judgment, that a lease for years is really only a sale of land for that period, and all sales of land imply a stipulation that the vendor has a good title. But it is clear law that no action will lie against a vendor for damages for contracting to sell land to which he has not a good title: *Flureau* v. *Thornhill* (3); *Bain* v. *Fothergill* (4), except perhaps to recover the expenses to which the purchaser has been put in investigating such title. The case was decided on demurrer, and is not of any value in the present discussion.

Then is the covenant absolute or limited? In *Andrews' Case* (5) it was held to be limited, and that upon the covenant implied from the word "demise" an action would lie if the lessor himself entered upon the lessee, but not if a stranger entered. This is consistent with the statement in Sheppard's Touchstone. On the other hand, in *Holder* v. *Taylor* (6) the implied covenant seems to have been treated as an absolute covenant broken by

(1) 4 Bing. N. C. 678; 5 Bing. N. C. 183.
(2) L. R. 2 C. P. 376.
(3) 2 W. Bl. 1078.
(4) L. R. 7 H. L. 158, at p. 210.
(5) Leon. 104; Cro. Eliz. 214.
(6) Hob. 12.

the fact that the lessor had no title at the date of the lease. This seems also to have been held, as already noticed, in *Bandy* v. *Cartwright*. (1)

Sufficient citations have been made to shew that upon the first three questions there is considerable conflict of authority. Upon the fourth question there is more uniformity. It seems to be settled that if the lessor's interest determines during the term and the lessee is thereupon evicted, no action can be maintained upon the implied covenant. In *Swan* v. *Stransham* (2) the lease was made by tenant for life by deed using the words "grant and demise." The lessor died during the term, and the remainderman entered and evicted the lessee. The action was brought upon the implied covenant, but it was held "that the executors of the tenant for life should not be charged by this covenant in law, because the covenant in law ends and determines with the estate of the lessor; and if it had been a covenant in fact or expressed or warranty of the term expressed it would be otherwise." This was followed in *Adams* v. *Gibney*. (3) This is different to the ordinary limitation of an express covenant for title, which according to the Conveyancing and Law of Property Act, 1881, is worded thus: "notwithstanding anything by the" lessor "or any one through whom he derives title otherwise than by purchase for value made, done, executed, or omitted, or knowingly suffered." Such a limitation would prevent the lessor being liable for the want of title in *Holder* v. *Taylor* (4), or the interruption in *Bandy* v. *Cartwright* (1), both of which were by title paramount and would not have been a breach of a covenant so limited.

In this case the Lord Chief Justice has followed the decisions in *Swan* v. *Stransham* (2) and *Adams* v. *Gibney* (3), which seem fully to support his judgment. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Fishers.*

(1) 8 Ex. 913.
(2) Dyer, 257 a.
(3) 6 Bing. 656.
(4) Hob. 12.

W. J. B.

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May 18, 20;
July 31.

PALMER *v.* DAY & SONS.

Bankruptcy—Mutual Dealings—Set-off—Deposit of Goods with Authority to Sell subject to approval of Price—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

The debtor instructed the defendants, a firm of auctioneers, to sell his house and furniture, and a sum of money became due from him to them in respect of their charges for the sale of the furniture and the attempted sale of the house. Subsequently he instructed the defendants to remove to their own premises certain pictures which had remained unsold, and to sell them subject to his approval of the price. The debtor became bankrupt while the pictures were still unsold, and the pictures were with other property of the bankrupt subsequently sold by the defendants, acting upon the instructions of the debtor's trustee in bankruptcy. The defendants claimed to deduct from the proceeds the money due to them for their charges in respect of the sale of the furniture and the abortive sale of the house:—

Held, that the deposit by the debtor of the pictures, with such an authority to sell and receive the proceeds, constituted a giving of credit by him to the defendants; that there were therefore mutual dealings between him and the defendants at the date of the bankruptcy, in respect of which the defendants had a right of set-off in bankruptcy under s. 38 of the Bankruptcy Act, 1883.

Appeal from a decision of the judge of the Maidstone County Court.

The following statement of facts is taken from the written judgment of the Court.

The plaintiff in this case, as trustee of one D. W. Langton, a bankrupt, sought to recover a sum of 31*l.* 10*s.* 9*d.* from the defendants, a firm of auctioneers, under the following circumstances. On September 29, 1894, Langton gave instructions to the defendants to sell the furniture of his freehold house, and he also gave them instructions to sell the house itself. The furniture sale took place on October 15 and 19. The house was put up for sale on November 8, but no sale was effected. The furniture sale account shewed a balance due to the auctioneers of 7*l.* 4*s.* 9*d.* Their charges in respect of the abortive sale of the house amounted to 24*l.* 6*s.*, these two sums amounting to the sum now in question—31*l.* 10*s.* 9*d.* Between the date of the furniture sale and the unsuccessful attempt to sell the house, some pictures,

which had been at the house of Langton and had been bought in at the furniture sale, were sent by him to the defendants' premises for the purpose of their being sold by the defendants. It was thought that there was a better chance of selling them, if sent there, than if left at Langton's house; but although they were thus sent there was no absolute right in the auctioneers to sell them without the approval of Langton as to price. On November 15 a receiving order was made against Langton. The plaintiff was appointed trustee on January 1, 1895; and on January 2 Langton was adjudicated bankrupt. On January 30 the trustee wrote to the defendants requesting them to remove some furniture, which had been bought in at the sale, to their premises, and dispose of it together with the pictures already at their office. The trustee added that any rights the defendants might have by way of lien upon the goods or proceeds of sale should not be prejudiced. The defendants accordingly sold, and claimed to deduct from the proceeds the two sums due to them in respect of the furniture sale and of the attempted sale of the house. The trustee disputed their right to do so, and brought this action in the county court at Maidstone to recover the amount sought to be deducted, namely, 31*l.* 10*s.* 9*d.*, that amount being made up of the 7*l.* 4*s.* 9*d.* due on the furniture sale and the 24*l.* 6*s.* due on the abortive house sale. The learned judge gave judgment for the defendants on the ground that there was one entire and indivisible contract between Langton and the defendants for the sale of the furniture and the house, and that they were therefore entitled by virtue of their auctioneers' lien to retain their charges in respect of both sales. He negatived a contention by the defendants that they were under any circumstances, whether the contract was one entire contract or not, entitled to a set-off in bankruptcy by virtue of s. 38 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). The plaintiff appealed from this decision.

May 18, 20. *E. Bray*, for the plaintiff. The defendants were not entitled to the benefit of a set-off upon the ground that the transactions were mutual dealings within the meaning of s. 38 of the Bankruptcy Act, 1883. It is true that the term "mutual

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dealings" is wider than "mutual debts" or "mutual credits," but it does not extend the right of set-off to a mere revocable authority to sell. The trustee had only a right to demand the return of the pictures, and on non-compliance to bring an action of detinue to recover the specific pictures themselves; such a claim would not result in a pecuniary liability, and the section would not apply: *Eberle's Hotels Co.* v. *Jonas.* (1)

[He also cited *In re Pollitt, Ex parte Minor.* (2)]

Hohler, for the defendants. The case of *Eberle's Hotels Co.* v. *Jonas* (1) is wholly distinguishable upon the facts; but the present case satisfies the rule there laid down, that s. 38 only applies where the claims on each side are such as result in a pecuniary liability. There was a credit on each side: there was a credit given by the defendants to the bankrupt in respect of the debt due from the latter to them for their charges as auctioneers; and there was a credit given by the bankrupt to the defendants within the meaning of the section when he delivered the pictures to them with instructions to sell, the authority not having in fact been revoked at the date of the receiving order. The receiving order fixed the position of the parties; and the property having been delivered under such circumstances as to amount to a mutual credit, the right of set-off attaches.

[He cited *Rose* v. *Hart* (3); *Peat* v. *Jones* (4); *Booth* v. *Hutchinson* (5); *Naoroji* v. *Chartered Bank of India* (6); *Astley* v. *Gurney* (7); *Elliott* v. *Turquand.* (8)]

Cur. adv. vult.

July 31. The written judgment of the Court (Lord Russell of Killowen C.J. and Charles J.) was read by

LORD RUSSELL of KILLOWEN C.J. [After stating the facts as above, the learned judge proceeded:—] We are unable to concur in the view of the learned judge of the county court that there was one entire and indivisible contract between Langton and the defendants in reference to both sales. We think, on the whole, that the evidence does not warrant that conclusion. The

(1) 18 Q. B. D. 459.
(2) [1893] 1 Q. B. 455.
(3) 8 Taunt. 499.
(4) 8 Q. B. D. 147.
(5) L. R. 15 Eq. 30.
(6) L. R. 3 C. P. 444.
(7) L. R. 4 C. P. 714.
(8) 7 App. Cas. 79.

case appears to us the ordinary one of auctioneers being instructed to sell, first, the furniture, and, secondly, the house. The mere fact that the instructions were given at or about the same time does not in our opinion justify the inference that the two sales took place under a single and indivisible contract. The circumstances of the two sales were different: they took place at different times and under different conditions. It therefore becomes necessary to consider whether his judgment can be supported on the other ground, that of mutual dealings, relied upon. Sect. 38 of the Bankruptcy Act, 1883, so far as is material, is as follows: "Where there have been mutual credits, mutual debts or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively." This is a re-enactment in substance of s. 39 of the Act of 1869, where, for the first time, the words "mutual dealings" were added to the words "mutual credits" and "mutual debts," which are alone used in the earlier statutes regulating the right of set-off in bankruptcy. The additional words undoubtedly have extended the right conferred by the earlier statutes. Under their provisions it had been considered from the year 1818, when *Rose* v. *Hart* (1) was decided, that although "mutual credits" is a wider term than "mutual debts," the credits must be such as either must terminate in debts or have a natural tendency to terminate in debts, and must not be such as terminate in claims differing in nature from debts (see Smith's Leading Cases, 9th ed. vol. ii. p. 336). The section in its present shape, however, has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages liquidated or unliquidated provided they arise out of contract. Thus, in *Booth* v. *Hutchinson* (2), damages for breach of covenant unascertained at the date of a deed of arrangement incorporating the enactments of

(1) 8 Taunt. 499.

(2) L. R. 15 Eq. 30.

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the Bankruptcy Act, 1869, were allowed to be set off against a claim for accruing rent. And in *Peat* v. *Jones* (1) the Court of Appeal followed *Booth* v. *Hutchinson* (2) in holding the mutual credit clause in the Act of 1869 applicable to a claim for unliquidated damages, and held that such a claim might be set off in an action brought by a trustee without recourse to the Court of Bankruptcy. The same rule is applicable, not only to actual breaches of contract, but also to breaches of obligations arising out of contract. It was accordingly held in *Jack* v. *Kipping* (3) that a claim for fraudulent misrepresentation on the sale of a chattel by a bankrupt could be set off against a claim by the trustee for the price.

But whilst the right of set-off has been thus widely extended, it is still subject to the limitation that the "dealings" must be such that in the result the account contemplated in the section can be taken in the way therein described. In other words, the dealings must be such as will end on each side in a money claim. Otherwise the claims are incommensurable. It was upon this ground that the Court of Appeal, in *Eberle's Hotels Co.* v. *Jonas* (4), held that the defendant could not set off a debt due from the plaintiff company to him under s. 38, the claim of the plaintiffs against him being for the return of chattels in specie in an action of detinue. There could not be an "account" as between goods and money, and no balance could be struck. It was contended by the plaintiff in the present case that the authority last referred to was in point. At the date of the receiving order—which it was admitted was the date at which the rights of the parties must be determined—the bankrupt, it was said, had a right to maintain an action of detinue for the return of the pictures in specie and nothing else. Such a claim, it was argued, did not arise from a "dealing" within the true meaning of that term as used in s. 38. It was the result of an interference with a right of property, and would not end in a money claim, and the case relied upon is no doubt an authority for that proposition. The defendants, on the other, hand contended that at the date of the receiving order no action for the return of the

(1) 8 Q. B. D. 147.
(2) L. R. 15 Eq. 30.
(3) 9 Q. B. D. 113.
(4) 18 Q. B. D. 459.

goods could have been maintained unless Langton had taken some step to alter the terms upon which the pictures had been deposited with them. Their position, they said, was that of bailees of the pictures with an authority to sell them, so that there was a mutual credit or mutual dealing then existing between the bankrupt and themselves—a credit on the one hand by them to him in respect of the sums due to them on the furniture sale account, and in respect of their charges for the attempted sale of the house, and a credit on the other hand by the bankrupt to them in respect of the pictures and the money to be realized by the sale.

We think that the latter is the true view of the relations between the parties. No action could, in our opinion, have been maintained by Langton when the receiving order was made. He had done nothing to revoke the authority conferred upon the defendants to keep the pictures on their premises for the purpose of sale, and the circumstance that he retained a control over the price does not seem to us to make any difference. The defendants were the depositaries of the pictures with an authority to sell them at approved prices, and as auctioneers they would certainly be entitled to receive for the vendor from the purchaser the amount realized. This authority could have been revoked; but until revoked the deposit, with such an authority to sell and receive the proceeds, constituted, in our opinion, a giving of credit to the defendants (see *Naoroji* v. *Chartered Bank of India* (1), approved in *Astley* v. *Gurney* (2)). There was a debt on one side and a delivery of property with directions to turn it into money on the other. Upon the ground, therefore, that s. 38 of the Bankruptcy Act, 1883, applies to this case, while we cannot agree with the reasons given in the Court below for the judgment, we think that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Sole, Turner & Knight, for Cripps & Son, Tunbridge Wells.*

Solicitor for defendants: *Day, Maidstone.*

(1) L. R. 3 C. P. 444. (2) L. R. 4 C. P. 714.

W. J. B.

X

1895
May 21.

In re CAREY.
Ex parte JEFFREYS.

Bankruptcy—Fraudulent Sale—Insolvent Trader—Sale of Business to Company for his own benefit—Bankruptcy of Trader—Winding up of Company—Rights of Trustee in Bankruptcy.

A trader, being in financial difficulties, sold his business to a limited liability company. The subscribers to the memorandum of association of the company were either his relatives or employees. No cash was paid by the company for the business, and no shares were issued to the public, and all the shares that were issued were issued as fully paid up. The trader was appointed the managing director of the company. Some months afterwards a receiving order was made against the trader, and the same day the company passed resolutions for a voluntary winding-up:—

Held, that the business and assets of the company formed part of the property of the bankrupt divisible amongst his creditors, subject to a first charge thereon in favour of the bonâ fide creditors of the company.

THIS was an application by the trustee in bankruptcy of E. Carey against the liquidator of the Carey Cycle Company, Limited, claiming a declaration that the property and business of the company formed part of the property of the bankrupt divisible amongst his creditors, under these circumstances:—

In July and August, 1894, the bankrupt, E. Carey, was carrying on business as a maker and vendor of cycles, and was in embarrassed circumstances. On July 23, 1894, he entered into a provisional agreement with one May for the sale and transfer of his business and the assets and goodwill thereof for 3000*l.* to a limited liability company about to be registered under the title of "Carey's Cycle Company, Limited."

On August 16, 1894, the said company was registered under the Companies Acts, 1862 to 1890, with a nominal capital of 5000*l.* divided into 5000 shares of 1*l.* each. The same day another agreement was entered into between E. Carey and May, by which May, as agent for the company, agreed to purchase E. Carey's business and the goodwill and assets thereof for 3000*l.*, to be paid as to 1500*l.* in fully paid-up shares of the company, and as to the remaining 1500*l.* in cash. The agreement

also provided that E. Carey was to be the managing director of the company for three years. No formal transfer was executed to the company; but from this date the business was carried on in the name of the company under the direction of E. Carey as managing director.

The seven subscribers to the memorandum of association of the company were either relatives or employees of E. Carey. No shares were issued to the public, and no cash was paid for any shares. 1500 fully paid-up shares were issued to E. Carey; but no cash was paid to him.

On December 4, 1894, a receiving order was made against E. Carey, and S. Jeffreys became the trustee in his bankruptcy; and on the same day the company passed resolutions for a voluntary winding-up and appointed a liquidator.

The trustee alleged that the said agreements of July and August, 1894, and the formation of the company, were simply devices on the part of the bankrupt to defeat and delay his creditors, and claimed a declaration as above stated.

Reed, Q.C., and *Carrington*, for the trustee in bankruptcy.
Wildey Wright, for the liquidator.

VAUGHAN WILLIAMS J. In this case the bankrupt, Carey, converted his business into that of a joint stock company. He sold his business to the company for 1500*l.* in fully paid-up shares in the company, and 1500*l.* in cash. He did not receive any cash, but some bills which were dishonoured at maturity. As far as matters of form went, there was a complete sale by Carey to the company, and the company was a separate legal corporation brought into existence in accordance with the Companies Act, 1862. But, although there was this sale in point of form from Carey to the company, yet in my judgment the business notwithstanding continued to be under his sole management and control, and was carried on for his exclusive benefit. I also find upon the evidence that Carey adopted this course of forming a company to purchase his business because he was at the time in financial difficulties; and when a trader forms a

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company of this kind, of which he retains the control, it is not true to say that there has been a sale by him to the company, because there is no principle of antagonism between the parties to the transaction. There is not in fact a buyer and a seller. The vendor is in reality the principal, and the company is merely his agent. In such a case one should treat the agreement as a nullity. In this case there is only one person, and that is the bankrupt himself. The company is merely another form that he has assumed. But it would be wrong to make third persons, not parties to the transaction, suffer by its invalidity. As regards the creditors of the company, therefore, I think I ought to treat the sale by the bankrupt to the company as a reality. Nor do I see any difficulty in so doing. There are several cases in equity, if not at law, where such a doctrine has been applied, and where a sale has been treated as valid for some purposes and as respects some persons, and invalid as respects others. So here, as far as the bankrupt is concerned, the sale by him to the company is a nullity, but so far as the bonâ fide creditors of the company are concerned, it must be treated as a reality. The bankrupt would have been estopped from saying the sale was a nullity as regards them, and his trustee stands in the same position. The company being merely the agents of the bankrupt, he is bound as principal to indemnify his agents against the obligations they have incurred on his behalf, and his trustee in bankruptcy can only take the assets of the company subject to the same duty.

I think the creditors of the company have a right to be paid first out of the assets of the company in preference to the general creditors of the bankrupt. I mean all those persons who became creditors of the company after its incorporation, and who were not parties to the arrangement between the bankrupt and the company, are to be paid in full out of the assets of the company in preference to the general creditors of the bankrupt, or, at their option, are to be entitled to prove against the general estate of the bankrupt pari passu with his general creditors in place of proving on the assets of the company. The trustee is entitled to a declaration that the assets of the company are part

of the general assets of the bankrupt, but subject to the rights of the creditors of the company as I have above indicated. (1)

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Solicitor for trustee: *A. Pyke.*

Solicitors for liquidator: *Bassett & Sons.*

H. L. F.

SMALLWOOD *v.* SHEPPARDS.

1895

Aug. 7.

Landlord and Tenant—Oral Agreement—Letting for non-continuous period—Entry—Payment of Rent on account—Right of Landlord to recover Balance of Rent—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

The plaintiff orally agreed to let a piece of waste ground to the defendant for three successive Bank holidays; the defendant was to have exclusive possession of the ground on those days, and to pay 45*l.* for the use of the ground, paying an instalment of 15*l.* for each of the three days. The defendant entered and occupied the land on the first of the three days, and after entry paid the first instalment of 15*l.*; he refused to occupy the ground on the other two days, or to pay to the plaintiff the balance of the rent. In an action by the plaintiff to recover the two remaining instalments, the defendant contended that the claim was barred by virtue of s. 4 of the Statute of Frauds:—

Held, that there having been an entry for the purpose of occupation under an agreement for a single letting (although the period of the agreed letting was not continuous) at a single rent, and a payment of rent on account of the entry, the plaintiff's right to recover the balance was not affected by the fact that the agreement was not in writing, and the Statute of Frauds afforded no defence to the claim.

APPEAL from a decision of the judge of the Birmingham County Court.

From the learned judge's notes the following facts appeared: The defendant was the proprietor of certain "roundabouts" and swings with which he was in the habit of attending at fairs, &c., in various parts of the country. In February, 1894, he was

(1) The case came before the Court of Appeal on August 2. The order drawn up on the judgment of Vaughan Williams J. contained a direction that the liquidator of the company should forthwith deliver to the trustee in bankruptcy all the assets which had come to his (the liquidator's) hands, subject to proper payments made by him. The liquidator objected to the insertion of this direction in the order, and appealed on that ground only. The Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.JJ.) dismissed the appeal, being of opinion that there was no ground for the objection.

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desirous of hiring some waste land for the purpose of erecting his roundabouts and swings on Bank holidays, and he saw the plaintiff with a view of obtaining the use of some land belonging to him. At the interview an agreement was verbally arrived at that the defendant should pay to the plaintiff the sum of 45*l.* for the use of the ground for the next three Bank holidays, Easter Monday, Whit Monday, and the first Monday in August. It was further agreed that the defendant was to pull down a shed which stood on the land, in consideration of which he was to be allowed the sum of 5*l.*; and that the defendant was to pay an instalment of 15*l.* in respect of each Bank holiday, less one-third of the allowance for pulling down the shed; it was also provided that if the land should be let by the plaintiff the defendant should not pay him in respect of the time during which he was not in occupation. The defendant paid the plaintiff a deposit of 5*l.* Upon Easter Monday the defendant entered and occupied the land under the agreement, and paid to the plaintiff the sum of 8*l.* 6*s.* 8*d.*, which, with the deposit of 5*l.* and 1*l.* 13*s.* 4*d.*, the proportionate part of the allowance for pulling down the shed, made 15*l.*, the amount of the first instalment. The defendant did not occupy the land on either of the other two Bank holidays, although he might have done so, and refused to pay the balance of the rent. The plaintiff sued the defendant to recover 26*l.* 13*s.* 4*d.*, the amount of the two instalments of rent, less the proportionate part of the allowance for removing the shed. The defendant contended that the contract, being one for an interest in land, required to be in writing; that the case, therefore, came within the operation of s. 4 of the Statute of Frauds, and that there had been no sufficient part performance to take it out of the section. The learned judge found that there was one single entire contract for 45*l.*; that there had been an entry by the defendant upon the land under that contract; that there had been a user of the land by him and a payment on account which could only be referable to one entire agreement, and not to three separate agreements; and that whether the contract was to be regarded as a lease or as a parol agreement under s. 4 of the Statute of Frauds, the requirements of the statute had been complied with and the plaintiff was entitled to judgment. The defendant appealed.

Edwardes Jones, (*J. F. P. Rawlinson* with him), for the defendant.

C. C. Scott, for the plaintiff.

[The following cases were cited: *Lavery* v. *Pursell* (1); *Taylor* v. *Caldwell* (2); *Boase* v. *Jackson* (3); *Wright* v. *Stavert* (4); *Ryley* v. *Hicks* (5); *Maddison* v. *Alderson*. (6)]

Cur. adv. vult.

Aug. 7. The written judgment of the Court (Wright and Kennedy JJ.) was read by

WRIGHT J. It appears to us that this appeal must be dismissed. It was agreed that we were to draw any inference of fact from the evidence as stated in the judge's notes which the judge might have drawn. We draw the inference that the parties intended that the defendant should have exclusive possession of the land for the three Bank holidays. The judge has found that the contract was a single entire contract for 45*l.*, by which we understand him to mean that he finds that it was not an agreement for three lettings at a separate rent or price for each of the three Bank holidays, but one agreement for the possession and use of the ground on the three occasions at a single lump rent or price of 45*l.* for the three; in other words, for one letting. The defendant entered on the land for the purpose of occupation under this agreement on one of the three days. After entry he made, as the county court judge finds, a payment of money on account, which can be referable only to one entire agreement. He might have occupied, had he chosen to do so, on the two later days which the letting covered.

In order to maintain an action for use and occupation after the close of the period for which it is sought to make the party sued liable, actual occupation is not necessary; it is sufficient if once there has been an entry, provided that the defendant might have gone on occupying had he chosen to do so. He has "held" (11 Geo. 2, c. 19, s. 14) although he has not "enjoyed."

It appears to us that, upon the facts, the defence of the Statute

(1) 39 Ch. D. 508.
(2) 3 B. & S. 826.
(3) 3 B. & B. 185.
(4) 2 E. & E. 721.
(5) 1 Str. 651.
(6) 8 App. Cas. 467.

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of Frauds fails. There having been an entry for the purposes of occupation under an agreement for a single letting (although the period of the agreed letting was not continuous) at a single or lump rent or price, and a payment of rent on account of the entry, the plaintiff's right to recover the balance after the termination of the letting period is in our judgment not affected by the fact that the agreement was a parol agreement.

Appeal dismissed.

Solicitor for plaintiff: *Whitelock, Birmingham, for T. W. Wright, Leicester.*

Solicitors for defendant: *Debenham & Walker, for Lambert, Birmingham.*

W. J. B.

1895
July 22;
Aug. 12.

In re DENNIS.
Ex parte DENNIS.

Bankruptcy—Receiving Order annulled—Payment into Court—Payment out after Six Years—Statute of Limitations (21 *Jac.* 1, *c.* 16)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 35, 36.

The principles which, under ss. 35 and 36 of the Bankruptcy Act, 1883, govern the annulment of an adjudication in bankruptcy are also applicable to the annulment of a receiving order.

A receiving order was annulled on payment into court by the debtor of a sum sufficient to pay in full those of his creditors for the payment of whose debts he could not produce receipts. After six years, no proof or claim having been made in the meantime by the creditors in question, the debtor applied that the sum in court might be paid out to him:—

Held, that the Statute of Limitations did not apply, and that he was not entitled to the order.

But *held*, that on the Court being satisfied that there was practically no possibility of the creditors or their personal representatives being found, and on reasonable security being given by the debtor for the repayment into court of the money if at any time the creditors or their personal representatives should appear and make a claim, the sum in court might be paid out to the debtor.

THIS was an application by the debtor that a sum in court might be paid out to him under these circumstances.

On November 19, 1888, a receiving order was made against the debtor. Between that date and March, 1889, he paid all his creditors in full, except two who could not be found and whose

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debts were entered in his statement of affairs at 40*l.* 10*s.* and 13*l.* 10*s.* respectively.

On March 12, 1889, the Court, on the application of the debtor, made an order rescinding the receiving order. The order recited that the debtor had paid into court the whole amount of the debts in respect of which he was unable to produce receipts shewing that they had been paid in full. Neither of the creditors ever tendered a proof or made any claim to the money in court.

On April 12, 1895, the official receiver wrote the debtor that there was a balance in court to the credit of his estate of 51*l.* 19*s.* 7*d.*, held subject to the claims of the two creditors; but he declined to hand it over to the debtor without an order of the Court. The debtor now applied that the 51*l.* 19*s.* 7*d.* might be paid out to him.

Rawlinson, for the debtor. There is no express provision in the Bankruptcy Act, 1883, with regard to the annulment of a receiving order, but it is submitted that it should be dealt with on the same footing as an adjudication: *In re Hester*. (1) The 35th section of the Act provides for the annulment of an adjudication in bankruptcy where the Court is satisfied that the debts of the bankrupt are paid in full; and the 36th section defines what "payment in full" means. Where a debt is disputed, a bond is to be given; and where a creditor cannot be found (which is the case here) the debt "shall be considered as paid in full if paid into court." In the case of a disputed debt, the bond is a security, and the Statute of Limitations would commence to run from the date of the bond. When the money is paid into court, the statute begins to run from the date when the receiving order is rescinded, because the debtor's statement of affairs and the payment into court is an acknowledgment of the debt, and during the receiving order the creditor's right of action is suspended. Directly the receiving order is rescinded the creditor's right of action revives, and the statute begins to run. The words "shall be considered to be paid in full" cannot be said to bar the creditor's right of action, and he is not estopped

(1) 22 Q. B. D. 632.

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from shewing that his debt is more than the sum paid into court. No trust for him is created by the payment in; but, if so, it is a trust on condition that he proves his debt. If he neglects or fails to do so within six years from the date of payment in, the trust fails and the money reverts to him who paid it in.

Muir Mackenzie, for the official receiver. When money is paid into court in this way, it is paid into a statutory account under the provisions of ss. 74 and 101 of the Bankruptcy Act, 1883, and cannot be paid out except under an order of the Court. The Board of Trade do not oppose the application. It is a matter entirely for the discretion of the Court.

Rawlinson, in reply.

VAUGHAN WILLIAMS J., after stating the facts, continued:—I wish first to say that in my judgment I ought to deal with the annulment of a receiving order upon exactly the same basis that I should deal with the annulment of an order of adjudication. The annulment of an order of adjudication is governed by the 35th and 36th sections of the Bankruptcy Act, 1883. The 35th section says: "Where in the opinion of the Court . . . it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order, annul the adjudication." Then the 36th section says: "For the purposes of this part of the Act, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor, who cannot be found or cannot be identified, shall be considered as paid in full if paid into court." It is suggested that the present case is within the Statute of Limitations, and that as these creditors have not applied for the amount which was paid into court to cover their claims, that the debtor is entitled to have the money back. I cannot assent to that. If I were dealing with the annulment of an adjudication under these sections, it clearly could not be argued. What s. 36 provides for is, first in respect of disputed debts. There, a bond is sufficient; and in that case it may very

well be that the effect of annulling the adjudication, or annulling the receiving order, is to make the Statute of Limitations apply; and I know of nothing which would prevent the statute applying, because in such a case there is no trust in favour of the creditor, and there is nothing that amounts to a payment to take the case out of the statute. But the section makes a difference in the case of debts which are not disputed. There, it does not provide for the giving of a bond, but that the money shall be paid into court. In my opinion it is not paid into court as security at all. It is paid into court for the creditor whenever he likes to come for it. Therefore, that contention has entirely failed. Now I am very anxious, if I can, to help the debtor here. It was his money originally; and, if really no one is going to claim the money, it does seem rather hard that he should not be able to get it back again. All I can do in the case is this. I will not now make any order that the official receiver shall pay the money back; but I think I may say that if the official receiver is really satisfied that these creditors for whose benefit this money was paid into court cannot be found, or that their personal representatives cannot be found, then, if he reports that, and if the debtor will give a bond, or such other security as the official receiver may think reasonable, to replace the money in case the creditors or their representatives should appear, I will make the necessary order authorizing the official receiver to pay the money out. But that is going very far. Considering that this money is, in a sense, paid in in trust for these creditors, in my opinion the Court ought not to part with the money unless it is satisfied, first, that there is practically no possibility of the creditor or his representative claiming the money, and, secondly, even where that is proved, then that reasonable security is given for the replacement of the money.

Solicitors for debtor: *Morse & Simpson.*
Solicitor for Board of Trade: *R. Murton.*

H. L. F.

1895
Oct. 25.

In re CORNISH.
Ex parte BOARD OF TRADE.

Bankruptcy—Trustee—Unclaimed Funds or Dividends—Liability to render Account—Board of Trade—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 162.

By s. 162, sub-s. 2 (*a*), of the Bankruptcy Act, 1883, where, after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands of any trustee empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee, it shall be the duty of such trustee forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. (*b*) The Board of Trade may at any time order "such trustee" to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding:—

Held, that the Board of Trade were entitled to enforce an order for an account against a trustee under this section without proving that he had had in his hands, after the passing of the Act, any unclaimed or undistributed funds or dividends.

APPEAL from a decision of the judge of the Exeter County Court.

In 1875 the debtor filed a petition in the county court for the liquidation of his affairs by arrangement, and in the same year E. Fewings was appointed trustee in the liquidation. In January, 1895, the trustee, at the request of the Board of Trade, furnished them with a summary of his receipts and payments on account of the liquidation, whereby it appeared that he had received assets to the extent of 850*l.*, and that he claimed to have made payments to the amount of 915*l.* Subsequently the Board of Trade, being dissatisfied with the trustee's statement, ordered him, under s. 162, sub-s. 2 (*b*), of the Bankruptcy Act, 1883 (1),

(1) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 162, sub-s. 2 (*a*): "Where, after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or

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to submit to them an account, verified by affidavit, of the sums received and paid by him in respect of the liquidation; and on his failing to comply with that order, the Board of Trade applied to the county court judge for an order that the trustee should comply with it. The trustee had obtained no release from the creditors. He had received some payments on account of the debtor's estate since the passing of the Bankruptcy Act, 1883, but had duly paid the amount of such payments into the Bankruptcy Estates Account at the Bank of England.

The county court judge refused to make the order asked for, on the ground that there was no evidence that the trustee had had in his hands, since the passing of the Act of 1883, any unclaimed or undistributed funds or dividends to which sub-s. 2 (*a*) of s. 162 applied. That being so, the judge thought himself bound by the judgment of Cave J. in *In re Chudley, Ex parte Board of Trade* (1), to refuse the application, though he said that, but for that judgment, he should have granted it.

The Board of Trade appealed.

Muir Mackenzie, for the Board of Trade. The learned county court judge was wrong in thinking that he was bound by *In re Chudley, Ex parte Board of Trade*. (1) The observations of Cave J. were directed to the facts of the case before him, in

other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish such trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof."

[The Bankruptcy Act, 1869, is one of the Acts mentioned in the fourth schedule.]

"(*b*) The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account."

(1) 14 Q. B. D. 402.

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In re CORNISH. *Ex parte* BOARD OF TRADE.

which it was admitted that the trustee had had undistributed funds in his hands since the passing of the Bankruptcy Act, 1883. The learned judge ordered the trustee to render an account; but he did not intend to construe the Act so as to decide the point raised here. In *In re Calderwood, Ex parte Board of Trade* (1), Cave J. ordered the trustee to furnish an account under circumstances somewhat similar to these.

Coldridge, for the trustee. In order to entitle the Board of Trade to enforce against the trustee, under s. 162, sub-s. 2 (*b*), of the Bankruptcy Act, 1883, an order for an account, they must first satisfy the Court that he has had in his hands, since the passing of the Act, some unclaimed or undistributed funds or dividends. The words "such trustee" in sub-s. 2 (*b*) refer to the trustee dealt with in clause (*a*), namely, a trustee in whose hands there have been, after the passing of the Act, unclaimed or undistributed funds or dividends. That construction was put upon the words by Cave J. in his judgment in *In re Chudley, Ex parte Board of Trade* (2), and should be adopted here. *In re Calderwood, Ex parte Board of Trade* (1), is distinguishable, because in that case there were undistributed funds in the hands of the trustee since the passing of the Act.

Further, the trustee is entitled to the protection of the Trustee Act, 1888 (51 & 52 Vict. c. 59). He is a "trustee whose trust arises by construction or implication of law" within the definition of "trustee" in s. 1, and by s. 8 (3) he may set up as an

(1) 6 Morr. 104.

(2) 14 Q. B. D. 402.

(3) Sect. 8: "(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

"(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the

answer to this "proceeding" the lapse of time in the like manner and to the like extent as if an action of debt for money had and received had been brought against him. No fraud or fraudulent breach of trust is alleged against the trustee here. In *In re Page, Jones* v. *Morgan* (1), the statute was successfully set up by the trustee under a will, against whom the cestui que trust claimed an order for the administration of the testatrix's estate.

Lastly, it is submitted that the trustee in the present case has rendered a sufficient account. His account shewed that he had made payments summarised under various heads, the amount of which payments exceeded the amount received by him.

Muir Mackenzie, in reply. The words "after the passing of this Act" in sub-s. 2 (*a*) of s. 162 of the Bankruptcy Act, 1883, only apply to the duty of the trustee to pay funds into the Bank of England instead of, as formerly, into some other bank. The Trustee Act, 1888, does not apply to such a case as this. There is no such relation between the Board of Trade and the trustee as that Act contemplates. The directions of the Bankruptcy Act, 1883, are precise and specific. A duty is imposed on the Board of Trade to require an account, and a discretion is given them to require it "at any time."

VAUGHAN WILLIAMS J. In my judgment the decision of the learned county court judge ought to be reversed. He says himself that he would have made the order asked for if he had not thought himself bound by the observations of Cave J. in *In re Chudley, Ex parte Board of Trade*. (2) I think that there is nothing in that case which precluded him from making the order he would otherwise have made. I will say at once what is my understanding of that case. An application was made to enforce against the trustee an order to render an account, and the answer made to that application was really this: counsel for the trustee relied on the fact that, prior to the making of the order, the creditors

like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute . . . . shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

(1) [1893] 1 Ch. 304.

(2) 14 Q. B. D. 402.

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In re CORNISH. *Ex parte* BOARD OF TRADE.

Vaughan Williams J.

had granted a release to the trustee. It was urged that the effect of that release was that there was no longer any obligation or power in the trustee to collect, receive, or distribute any funds whatever. It was contended that under those circumstances sub-s. 2 of s. 162 of the Bankruptcy Act, 1883, did not apply, because it applied only to trustees or other persons empowered by the Acts mentioned in the fourth schedule to collect, receive, or distribute any funds or dividends. Cave J., in dealing with that argument, assented to it to this extent—he agreed that the trustee must be a person empowered under the scheduled Acts to collect, receive, or distribute funds or dividends; but he said that the release by the creditors which was relied on afforded no answer to the application. He pointed out that, after the Act of 1883 came into force, there was admittedly a time at which the trustee had funds in his hands which he was bound to distribute, and therefore that he came within the provisions of sub-s. 2. It is now said that Cave J.'s answer to the argument put forward on behalf of the trustee supports the proposition that the Board of Trade, in order to entitle themselves to order an account under clause (*b*) of sub-s. 2, must first prove that the trustee has, after the passing of the Act of 1883, had in his hands some money which he was bound to distribute. I am of opinion that the case of *In re Chudley, Ex parte Board of Trade* (1), in no way prevented the county court judge in the present case from making the order. Cave J., in my view, did not intend to define the conditions under which the enactment in clause (*b*) is to take effect. Let me now deal with the section itself. Sub-s. 1 of s. 162 deals with the case of trustees appointed in bankruptcies, compositions, or schemes under that Act, and I need not further refer to it. Sub-s. 2 (*a*) deals with the case of trustees or other persons empowered to collect, receive, or distribute any funds or dividends under the scheduled Acts, and provides that where, after the passing of the Act of 1883, a trustee has in his hands any funds which he is bound to deal with as trustee, he is to pay them to the Bankruptcy Estates Account at the Bank of England. It has been argued that the words "such trustee" in clause (*b*) must be read as meaning a

(1) 14 Q. B. D. 402.

trustee who, after the passing of the Act, is a trustee having funds in his hands which he is bound to pay into the Bank of England. I do not agree with that argument. I think the words "such trustee" in clause (*b*) mean a trustee appointed under any of the scheduled Acts; and, if that be so, the Board of Trade are clearly right in asking for this account. I think it would be wrong to put any other construction upon clause (*b*), because it is intended to provide machinery to test the veracity of a man who denies that he has received any funds so as to be brought within clause (*a*). The very object of clause (*b*) is that the Board of Trade may not be concluded by the bare assertion or denial of the trustee. I do not think that in *In re Chudley, Ex parte Board of Trade* (1), Cave J. intended to decide anything to the contrary of the view I have expressed.

It was further suggested that the Trustee Act, 1888, afforded an objection to the making of this order. I do not think it does. Under certain circumstances the trustee would be an accountable party; under others he would not. The object of clause (*b*) in the Act of 1883 is to make him furnish such a statement as will enable it to be determined whether he is or is not an accountable party. When he has furnished the account it may be, or it may not be, that any claim against him to a balance of account is barred by a statute of limitations. I have nothing to say on that question; but I think he must render an account, and I think that by the course he has himself taken he has recognised his position as an accountable party. This appeal must, therefore, be allowed.

KENNEDY J. I entirely agree.

Appeal allowed. Leave to appeal was given.

Solicitor for appellants: *The Solicitor of the Board of Trade.*
Solicitors for respondent: *Collyer & Collyer.*

(1) 14 Q. B. D. 402.

W. A.

C. A.
1895
Oct. 29.

[IN THE COURT OF APPEAL.]

MOWBRAY AND ANOTHER *v.* MERRYWEATHER.

Damages—Contract—Breach of Warranty—Remoteness.

The plaintiffs, a firm of stevedores, contracted to discharge a cargo from the defendant's ship, the defendant agreeing to supply all necessary cranes, chains, and other gearing reasonably fit for that purpose. The defendant in breach of his agreement supplied a defective chain, which broke while being used, and in consequence one of the plaintiffs' workmen was injured. The plaintiffs might have discovered the defect in the chain by the exercise of reasonable care. The workman brought an action for compensation under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), ss. 1, 2, against the plaintiffs, who settled the action by paying the workman 125*l.*, which sum they sought to recover from the defendant as damages for breach of his contract. It was not disputed that the settlement of the action brought by the workman was a proper one :—

Held, that the plaintiffs' liability to pay compensation to their workman was the natural consequence of the defendant's breach of contract, and such as might reasonably be supposed to have been within the contemplation of the parties when the contract was entered into; and therefore the damages claimed were not too remote.

APPEAL from the judgment of Charles J. at the trial before him without a jury. (1)

The facts were as follows. The plaintiffs were stevedores, and the defendant was the owner of a steamship. The plaintiffs contracted to discharge a cargo of deals from the ship, and, in accordance with the custom of the port, the defendant undertook to provide all necessary and proper derricks, cranes, chains, winches, and other gearing reasonably fit for the purpose of discharging the cargo. He failed to do so, and supplied a chain so defective that, whilst it was being used in discharge of the cargo, it broke, and thereby a workman of the plaintiffs was seriously injured. The injured workman thereupon brought an action against the plaintiffs under the provisions of the Employers' Liability Act, 1880, ss. 1, 2, basing his claim upon the defective condition of the chain, which he alleged might have been discovered by the plaintiffs by the exercise of reasonable care.

(1) [1895] 1 Q. B. 857.

The plaintiffs did not contest the action, and paid the workman 125*l.*, which they now sought to recover from the defendant in an action for breach of his contract. It was not suggested that the settlement of the action brought by the workman was an improper one, and it was admitted upon the trial by the defendant on the one hand that there had been a breach of the implied warranty that the derrick, cranes, and chains should be reasonably fit for the purpose for which they were supplied; and by the plaintiffs on the other hand that they might by the exercise of reasonable care have discovered the defect in the chain. The defendant contended that the damage claimed was too remote. The learned judge gave judgment for the plaintiffs for the amount claimed.

E. Tindal Atkinson, Q.C., and *H. Gawan Taylor*, for the defendant. The damages claimed are too remote. The damage to the workman would never have resulted from the breach of warranty but for the intervening negligence of the plaintiffs. The plaintiffs cannot throw on the defendant as a consequence of the breach of contract the liability for their negligence. It might be in the contemplation of both parties to the contract that the chain would be used by the plaintiffs' workman, but not that the plaintiffs would be negligent in not examining it. The natural result of the breach of warranty would be that the plaintiffs might be put to expense in making good the defect or getting another chain; but it is not the natural result that they should negligently allow it to be used without examination.

[LORD ESHER M.R. The question is whether the plaintiffs are not entitled to say that they were misled into their breach of duty towards the workman by the warranty.]

The warranty was an implied one only, and it was not alleged or shewn that in fact the plaintiffs were so misled. It cannot be that the plaintiffs are entitled as against the defendant to allow a chain with an obvious defect in it, as this was, to be used by their workmen, and then recover the amount they have had to pay in consequence of their negligence as damages for the breach of warranty.

[LORD ESHER M.R. The admission that the defect might

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MOWBRAY v. MERRYWEATHER.

have been discovered with reasonable care does not seem to me to import that the defect was obvious to the eye, but only that it could be discovered by examination.]

If the plaintiffs' contention is correct, persons in the position of the plaintiffs secure immunity from the consequences of their negligence by taking a warranty, and need exercise no care towards their workmen. It may be admitted that upon the principle laid down in *Heaven* v. *Pender* (1) the workman could have recovered these damages from the defendant. That is because the defendant under the circumstances owed a duty to use reasonable care to the workman. But it does not follow that the plaintiffs, whose liability to the workman depended on their own negligence, can recover the damages which resulted from that negligence from the defendant. The case is analogous to that of joint tortfeasors, one of whom cannot sue the other for contribution. Such damages cannot be said to be the natural result of the breach of warranty, or to have been in the contemplation of the parties. [They cited *Burrows* v. *March Gas and Coke Co.* (2); *Wrightup* v. *Chamberlain* (3); *Kiddle & Son* v. *Lovett* (4); *Ovington* v. *McVicar.* (5)]

Robson, Q.C., and *Meynell*, for the plaintiffs, were not called upon.

LORD ESHER M.R. I have no doubt about this case, though we have now to determine the point raised for the first time. The action is brought for breach of a warranty given by the defendant to the plaintiffs. That such a warranty was given is not disputed. It was one implied by law, but that appears to me to make no difference. It was to the effect that the chain in question was so far sound as to be sufficient for the work which the plaintiffs had to do as stevedores. It is admitted that there was a breach of that warranty. There was consequently a contract, with a breach of it, and therefore there was a cause of action for which at any rate nominal damages would be recoverable. But the plaintiffs say that they are entitled to more than

(1) 9 Q. B. D. 302; 11 Q. B. D. 503.
(2) L. R. 5 Ex. 67; 7 Ex. 96.
(3) 7 Scott, 598.
(4) 16 Q. B. D. 605.
(5) 2 Court Sess. Cas. 3rd Series, 1066.

nominal damages on the following grounds. They say that the defendant warranted this chain to be sufficient for use by them in their business as stevedores, knowing that the way in which they must use it in that business was by letting their workmen use it; and he must have known that, if the chain supplied to be used in that way was insufficient, one of those workmen might be injured. The plaintiffs would know that too. Therefore, both parties would contemplate, as a natural result of a breach of the warranty, that a workman of the plaintiffs might be injured, and also that, if injured, he might have a right of action against the plaintiffs. The plaintiffs say that they took the chain on the faith of the warranty and gave it to their workmen to use; while being so used it broke, because it was not in accordance with the warranty: that was the sole cause of its breaking; and the natural result was that this workman was injured; and he thereupon sued the plaintiffs in respect of his injuries, and they were compelled to pay him the amount which they now seek to recover from the defendant. It is true that he could not have recovered unless, as between himself and the plaintiffs, the plaintiffs had been guilty of want of care; but the plaintiffs say that, as between themselves and the defendant, they were not bound to examine the chain because the defendant had warranted it sound, that they had a right to rely on that warranty, and did rely on it, and the defendant cannot rely on a duty to use due care which was owed, not to him, but to the workman. Therefore they say that all that happened as between themselves and the workman was the natural result of the defendant's breach of warranty, and they are entitled to recover in this action the amount which they have had to pay as damages to the workman. The question raised is whether these damages are too remote. What is the rule of law on the subject? The test is rightly laid down by Charles J. when he says that the question is whether the damages can "be regarded as the natural consequence of the defendant's breach of contract, or, in other words, a consequence which might reasonably be supposed to have been within the contemplation of the parties." I think that the plaintiffs' contention is correct, and that, if the defendant, having contracted to supply a sufficient chain, supplies a

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Lord Esher M.R.

rotten chain for the purposes of the work which he knows will be done by the plaintiffs' workmen, it may reasonably be supposed to have been in his contemplation that injury might result to a workman in respect of which the plaintiffs would be liable to pay damages. The plaintiffs owed no duty to the defendant to examine the chain before allowing it to be used by their workmen. The only duty they owed in that respect was to the workman. With regard to the authorities cited, I prefer the opinion expressed by Martin B. in the case of *Burrows* v. *March Gas and Coke Co.* (1) to that expressed by the Scottish judges in the case of *Ovington* v. *McVicar.* (2) I think it is clear that the damages which the plaintiffs claim are not too remote. I think that the judgment of Charles J. was right, and that the reasons which he gave for it were correct, and that this appeal must therefore be dismissed.

KAY L.J. In this case the action is brought for breach of a warranty that a chain was reasonably fit for the purpose for which it was to be used; and neither the warranty nor the breach of it has been or could be denied. The chain in question was supplied by the defendant to be used by the plaintiffs as stevedores in discharging a ship. The chain was defective, because one link had a crack in it. While the chain was being used it broke, and thereby a workman of the plaintiffs who was using it was injured. The plaintiffs seem to have relied on the warranty, and not to have examined the chain before using it. The result was that the workman had a remedy against two parties. He might, according to the principle laid down in *Heaven* v. *Pender* (3), have sued the present defendant, who supplied the chain, or the plaintiffs, his employers, because they had been negligent in not discovering the defect. He sued the plaintiffs, and they, feeling that they could not defend the action, paid him the sum of 125*l.* It is admitted—and this is, to my mind, a most important admission—that this sum was a proper sum to pay; and it was not disputed by the defendant's counsel that, if the workman had sued the defendant who supplied the chain

(1) L. R. 5 Ex. 67; 7 Ex. 96. (2) 2 Court Sess. Cas. 3rd Series, 1066.
(3) 9 Q. B. D. 302; 11 Q. B. D. 503.

instead of the plaintiffs, he could have recovered the same amount from him direct. The plaintiffs, having paid that amount to the workman, bring their action against the defendant for breach of warranty that the chain was sufficient for the purposes for which it was supplied, and they claim as damages the amount which they have so had to pay. The defence set up is that they would not have been liable to pay that sum unless they had been negligent, and that their liability to the workman did not therefore arise solely from the defect in the chain, but from that and their negligence. If it could have been made out that the damages paid to the workman were more than he could have recovered against the defendant who supplied the chain, it might be that they would not have been the proper measure of damages in this action; but, as I have said, it has been admitted that the amount which was actually paid him could have been recovered by him from the present defendant direct. Suppose in such a case the accident had happened to the stevedore himself, clearly he could have recovered these damages for breach of the warranty. The only question is one of the amount of damages; and I see no reason for saying that this sum, which could have been recovered by the workman from the defendant, is not the proper amount to be recovered in this action. I cannot see that the fact that the plaintiffs would not have been liable without negligence towards the workman relieves the defendant from the consequences of his breach of contract. The plaintiffs were guilty of no negligence as between themselves and the defendant, and they are entitled, I think, to say as between themselves and the defendant that he gave them a warranty on which they had a right to rely. I think the damages claimed by the plaintiffs must be considered as being the natural result of the breach of warranty, and one which must be deemed to have been within the contemplation of both parties as likely to spring from that breach.

With regard to the cases cited, all but two of them are clearly distinguishable. In the case of *Wrightup* v. *Chamberlain* (1), the question was whether the plaintiff, who, having bought a horse from the defendant with a warranty, had resold it with a

(1) 7 Scott, 598.

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Kay L.J.

similar warranty, and had improperly defended an action against him on that warranty, could recover from the defendant, not only the damages which he had been compelled to pay, but also the costs incurred in defending the action which he had improperly defended. Suppose in the present case the plaintiffs had improperly defended the action against them. It is obvious that they could not have recovered the costs incurred by so doing. Such costs would not be damages naturally arising from the breach of warranty. In the case of *Kibble & Son* v. *Lovett* (1), the employers had paid the workman damages where they had not been guilty of any negligence. It was clear that, when an action for breach of contract was brought against a person in the position of the present defendant, that gratuitous payment could not be the measure of damages. The only other cases referred to are the cases of *Burrows* v. *March Gas and Coke Co.* (2), in which Martin B. distinctly expressed an opinion from which it follows that in a case such as this the damages paid to the workman would be the proper measure of damages, and *Ovington* v. *McVicar* (3), where the Scottish judges intimated a different opinion. I prefer the view expressed by Martin B. to that taken by the Scottish judges. I entirely concur in the reasoning of Charles J. in the Court below. For these reasons I think the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. The action was for breach of warranty. It is admitted that in the circumstances under which this chain was supplied there was a warranty at any rate to the extent that the defendant would use reasonable care that it should be fit and proper for the purpose for which it was to be used. It is clear that he used no care at all. It seems to me that the effect of the warranty is that the defendant agrees with the plaintiffs that they may rely on him for the sufficiency of the chain as a matter of contract, and as between him and them there was no duty whatever on their part to examine the chain to see whether it was sufficient. It is true that under the Employers' Liability Act, and probably at common law,

(1) 16 Q. B. D. 605.
(2) L. R. 5 Ex. 67; 7 Ex. 96.
(3) 2 Court Sess. Cas. 3rd Series, 1066.

the liability of the employers in respect of the injury to the workman depended upon the condition that the employers had been negligent in not examining the chain. But the use of the word "negligence" implies a duty to use due diligence, and such a duty may be owed to one person and not to another. The defendant sets up in answer to the plaintiffs' claim that there was an absence of due diligence on the part of the plaintiffs. But there was no want of due diligence as between the plaintiffs and the defendant, because, as I have said, the warranty means that, as between him and the plaintiffs, they may rely on the warranty. The only question here appears to be whether the damages claimed may reasonably be supposed to have been within the contemplation of the parties when the contract was made. That they may seems to me to follow from the admission that these very damages might have been recovered by the workman from the shipowner direct. I am not at present satisfied that in the case of *Ovington* v. *McVicar* (1) the Scottish judges intended to lay down any such rule as that contended for by the defendant's counsel as applicable to a case like the present; but, if they did, I do not think it a rule of English law.

Appeal dismissed.

Solicitors for plaintiffs: *Baker, Lees, & Postlethwaite, for Higson Simpson, West Hartlepool.*

Solicitors for defendant: *W. A. Crump & Son, for Turnbull & Tilly, West Hartlepool.*

(1) 2 Court Sess. Cas. 3rd Series, 1066.

E. L.

C. A.
1895
Nov. 7.

[IN THE COURT OF APPEAL.]

CAFFIN *v.* ALDRIDGE.

Ship—Charterparty—Cargo—Hiring of Entire Capacity of Ship—Deviation.

By a charterparty which was on a printed form filled in with writing, and which commenced with a statement that the ship was of a dead weight capacity of 125 tons, it was agreed between the plaintiff and the defendant, the shipowner, that the ship should load at Rotherhithe from the plaintiff "a cargo or estimated quantity of 470 quarters of wheat" and proceed with it to Gosport, and there deliver it, on being paid freight at 1s. per quarter of 496 lbs. delivered. The words "full and complete" which preceded the word "cargo" in the printed form had been struck out. The charterparty contained the usual exception of sea perils. It was also thereby provided that the ship should have "liberty to call at any ports in any order." Four hundred and seventy quarters of wheat represent 102 tons. The ship, having loaded the wheat, proceeded to Millwall, where she took on board from another shipper some wire torpedo netting for carriage to Portsmouth Dockyard. The ship proceeded to Portsmouth Dockyard, where she discharged the netting, and was crossing the harbour to Gosport when by an accident arising from sea perils she sprang a leak, whereby the wheat was damaged. The plaintiff claimed to recover damages for the injury to the wheat on the ground that the ship had deviated in not proceeding direct to Gosport:—

Held (affirming the judgment of Lord Russell of Killowen C.J.), that the liberty "to call at any ports" included liberty to call for the purpose of loading or discharging other cargo there, for that the charterparty, notwithstanding the use of the term "cargo," did not amount to a hiring of the full carrying capacity of the ship, and that there had consequently been no deviation, and the plaintiff could not recover.

Appeal from the judgment of Lord Russell of Killowen C.J. without a jury. (1) The facts were as follows. By a charterparty dated June 23, 1894, which was headed with the words "Dead weight capacity, 125 tons," it was agreed between the defendant, the owner of the ship *Alice Little*, and the plaintiff John Caffin, merchant, that the ship should proceed to Rotherhithe, "and there load from the factors of the said affreighter a cargo or estimated quantity of 470 qrs. wheat in sacks $\frac{\text{and}}{\text{or}}$ other lawful merchandise," and, being so loaded, should "therewith proceed to Gosport (Royal Clarence Yard)," and there deliver

(1) Ante, p. 366.

the same on being paid freight at 1s. per quarter of 496 lbs. delivered.

The charter contained the usual exception of sea perils and a clause giving the ship "liberty to call at any ports in any order." It was also provided that, if the vessel should put into port on the passage, the shipper should be informed thereof. The charter was on a printed form, according to which the ship was to load "a full and complete cargo"; but the words "full and complete" were struck out, and the words "or estimated quantity of, &c.," added in writing. Four hundred and seventy quarters of wheat represent about 102 tons. The ship, having loaded the wheat at Rotherhithe under the charter, instead of proceeding straight to Gosport, went to Millwall, where she took on board from another shipper ten tons of wire torpedo netting for carriage to Portsmouth Dockyard. Rotherhithe and Millwall are both in the port of London, and Gosport and Portsmouth Dockyard are both in the port of Portsmouth. With this cargo on board the ship proceeded to Portsmouth Dockyard, where she discharged the netting. She then proceeded across the harbour to Gosport, and while on the way, by an accident arising from sea perils, she sprang a leak, whereby the wheat was damaged. The plaintiff brought the action to recover damages for the injury to the wheat on the ground that the ship, in not proceeding direct from Rotherhithe to Gosport, had deviated from the chartered voyage, and that the damage had occurred in the course of that deviation. The Lord Chief Justice gave judgment for the defendant.

Scrutton, for the plaintiff. The true construction of this charterparty is that the plaintiff was hiring the full carrying capacity of the ship, and the defendant was not to carry any other cargo. That is the natural import of the word "cargo," and any construction of the charterparty which gives the shipowner liberty to carry other cargo does not give a sufficient meaning to that word. The liberty to call at any ports, therefore, did not include liberty to call for the purpose of loading or discharging cargo; and consequently in calling at Portsmouth dockyard to discharge the torpedo netting the ship deviated

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from her chartered voyage, and the damage, having occurred in the course of that deviation, is not covered by the exception of sea perils. The words "full and complete" were probably struck out in order to avoid any possible claim for dead freight by the shipowner. [He cited *Borrowman* v. *Drayton* (1) and *Glynn* v. *Margetson*. (2)]

F. W. Raikes, Q.C., and *Butler Aspinall*, for the defendant, were not called upon.

LORD ESHER M.R. I think the construction put on this charterparty by the Lord Chief Justice was obviously right. It does not afford much assistance in the construction of one written contract to shew how some other written contract in different words was construed. The word "cargo" is, I think, capable of either of the meanings contended for according to circumstances. To see what it means here, I think we must look to the charterparty in this case, and to that alone. The word "cargo," as the Lord Chief Justice pointed out, may mean a full and complete cargo, or it may, under the circumstances, mean that which is to be carried for the particular shipper—namely, in this case, 470 quarters of wheat in sacks. It seems to me obvious on the terms of this charterparty that it did not here mean a full and complete cargo. In order to see what it meant, one must look at the rest of the document. We find that the words "full and complete," which were originally in the printed form, had been struck out. The plaintiff's counsel contends that, these words having been deliberately struck out, by necessary implication the Court must put them in again. I cannot agree with him. I think the judgment of the Lord Chief Justice was right, and that for the reasons which he gave.

LOPES L.J. I am of the same opinion. It is clear to my mind that it was never intended that what was to be shipped under this charterparty should be shipped as a full and complete cargo. The words "full and complete" were erased; and that could only, I think, have been done for the purpose of shewing that such was not the intention. It was clear on the face of the

(1) 2 Ex. D. 15. (2) [1893] A. C. 351.

charterparty that the full capacity of the ship was not exhausted by what was to be put on board under it. There are other words in the charterparty which make the meaning still plainer. Liberty is given to the ship to call at any ports in any order. I think those words were clearly inserted because, the full capacity of the ship not being exhausted, it was contemplated that the ship should have liberty to take in and discharge cargo at other places. The torpedo netting in question was taken in and discharged in the course of the vessel's voyage from Rotherhithe to Gosport; and upon the construction which I put upon the charterparty this did not constitute a deviation. For these reasons I think the judgment of the Lord Chief Justice was right.

KAY L.J. The only question raised by this case is as to the meaning of this particular charterparty. It is headed with the words "Dead weight capacity, 125 tons." It was a charterparty for the carriage of 470 quarters of wheat in sacks from Rotherhithe to Gosport. Putting aside the fact that the words "full and complete" were struck out, it may be observed that these words are, as is well known, commonly inserted in charterparties, and they are not in this one, but instead we have the words "Cargo or estimated quantity of 470 qrs. wheat"; and it is provided that the freight shall be payable at 1s. per quarter of 496 lbs. delivered. The quantity so mentioned does not represent 125 tons, which is mentioned in the charterparty as the full capacity of the ship, but only 102 tons, as appears on the face of the charterparty. Therefore, so far, it is at least doubtful on the face of the document whether the word "cargo" was meant to include the whole capacity of the ship. But it seems to me that the words which follow make the matter clear. The ship is to have liberty to call at any ports in any order. What could be the meaning of such a clause if she was only to carry this wheat from Rotherhithe to Gosport? That clause appears to me to have been put in because the parties knew that what was to be loaded under the charterparty would not fill up the ship, and therefore she was to be at liberty to carry other cargo, and for that purpose to call at intermediate ports. The place where

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she called was clearly such an intermediate port. Under those circumstances, I think the Lord Chief Justice was right in saying that there was no deviation; and this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *J. A. & H. E. Farnfield.*
Solicitors for defendant: *Farlow & Jackson.*

E. L.

C. A. 1895 *Oct.* 29.

[IN THE COURT OF APPEAL.]

COTTON *v.* VOGAN & CO.

London, City of—Grain Duty—"Grain brought into the port of London for sale"—Manufacture of Grain into other articles—Metage on Grain (Port of London) Act, 1872 (35 & 36 *Vict. c. c.*), s. 4.

The Metage on Grain (Port of London) Act, 1872, s. 4, which entitles the corporation of London to a duty "in respect of all grain brought into the port of London for sale," applies only to grain brought in for sale as such, and not to grain brought in to be manufactured into other articles of commerce.

Grain brought into the port of London was taken to the mills of the consignees. Part of it was there ground into meal between rollers, and then sold by the consignees in that condition. The remainder was crushed and cracked between rollers, and then sifted so as to separate the crushed and cracked grain from the meal resulting from such crushing and cracking, which was sold separately. The crushed and cracked grain was then mixed in certain proportions with other sorts of grain which had been similarly treated, and when so mixed was sold for horse food:—

Held, that the corporation were not entitled to duty under the Act in respect of the grain.

APPEAL from a judgment of the Mayor's Court for error on the record.

The plaintiff, as the chamberlain of the City of London, on behalf of the corporation, sued the defendants in the Mayor's Court as the owners and consignees of certain quantities of "grain" within the meaning of the Metage on Grain (Port of London) Act, 1872, brought into the port of London for sale within the meaning of that Act, for duties alleged to be due from them to the corporation under the Act at the rate of three-sixteenths of a

penny per hundredweight on such grain. The jury found a special verdict which, so far as material to this report, was to the following effect. The defendants, who were dealers in grain and millers carrying on business in London, were the owners and consignees within the meaning of the Metage on Grain (Port of London) Act, 1872, of certain quantities of maize and certain quantities of oats, brought by steamers into the port of London within the meaning of the Act. When discharged from the steamers the maize and oats were taken to the defendants' mills. A portion of the maize was there ground into meal between rollers, and then sold by the defendants in that condition. The remainder was crushed and cracked between rollers, and then sifted so as to separate the crushed and cracked maize from the meal which resulted from such crushing and cracking. The meal was then sold separately from the crushed and cracked maize. The crushed and cracked maize was then mixed in certain proportions with beans, peas, and oats, which had been similarly treated, and, when so mixed, was sold for horse food. The oats were first washed, then laid out to dry, then sifted so as to get rid of the dirt which accompanied them, then crushed between rollers, then sifted so as to separate the crushed oats from the meal and chaff which resulted from such crushing, and then mixed in certain proportions with beans, peas, and maize which had been similarly treated, and when so mixed were then sold as horse food. It was found by the verdict that the maize and oats were respectively brought into the port of London by the defendants for the purpose of being dealt with as aforesaid, and then sold as aforesaid. The question raised by the special verdict was whether or not the above-mentioned maize and oats were "brought into the port of London for sale" within the meaning of the Metage on Grain (Port of London) Act, 1872, and the defendants were consequently liable under the Act to pay the duty of three-sixteenths of a penny per cwt. upon them respectively, or any part thereof. Judgment was given in the Mayor's Court upon the special verdict for the defendants. (1)

(1) By the Metage on Grain (Port of London) Act, 1872 (35 & 36 Vict. c. c.), s. 4, "From and after the thirty-first day of October One thousand eight hundred and seventy-two and for thirty years thereafter, the

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Sir E. Clarke, Q.C., and *Danckwerts*, for the plaintiff. The maize and oats were grain "brought into the port of London for sale" within the meaning of the Act. The effect of the Act is not confined to grain which is brought in for sale as such. Assuming that the Act does not apply where the grain, before sale, is converted into a different substance chemically or used in the manufacture of some article which cannot be said to be the same substance as the original grain—as, for instance, where it is made into bread—that would not affect the result in this case, for here no change was effected in the substance of the grain. All that happened here was that the substance of the grain was divided, and the different parts unchanged in substance were sold separately. The grain was none the less brought in for sale because it was not intended that it should be sold whole, but that its component parts should be sold separately. The substance is not changed, but only sold in a different condition. The meal is part of the grain that has been ground. The crushed and cracked maize and oats are also part of the grain. That they have been mechanically mixed with other grain and sold as part of such mixture does not prevent there having been a sale of them within the meaning of the Act. The contention for the defendants involves the addition of words to the Act to the effect that the sale must be of the grain "as such," or "in the same condition as that in which it arrived." The words "brought in for sale" are, no doubt, words of limitation; but the antithesis to grain brought in for sale, in respect of which it was intended to confer exemption, is "grain brought in for consumption," as where an omnibus company import maize as food for their horses.

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corporation may demand and receive in respect of all grain brought into the port of London for sale a duty at the rate of three-sixteenths of a penny per hundredweight, to be called the City of London Grain Duty, and such duty shall, subject to the provisions of this Act, be held by the corporation for the preservation of open spaces in the neighbourhood of London, not within the metropolis as defined by the Metropolis Management Act, 1855."

By s. 2 of the Act, "'Grain' means corn, pulse, and seeds, except the following seeds when brought into the port of London in sacks or bags; (that is to say,) linseed, rapeseed, millet seed, canary seed, cotton seed, poppy seed, teel seed, niger seed, gingetty seed, and sesame seed."

[They cited *Attorney-General* v. *Green* (1); *Scott* v. *Taylor* (2); *Pharmaceutical Society* v. *Armson*. (3)]

Joseph Walton, Q.C., and *Albert Gray*, for the defendants. The words "grain brought into the port of London for sale" must mean grain brought in for sale as grain. This construction involves no addition to the words of the Act. It is their natural meaning. There are three alternatives. The grain may be brought in for sale, or for consumption, or for manufacture. It is only to pay duty when brought in for sale. In this case the grain was brought in for manufacture. If the grain is sold in its original name and character, the case is within the Act; but if it is manufactured into an article of a different name and character, and that article is sold, the case is not within the Act. A contract for sale of oats or maize would not be satisfied by the delivery of oatmeal or crushed maize.

The cases relied on for the plaintiff turned on other statutes passed alio intuitu.

Sir E. Clarke, in reply.

LORD ESHER M.R. This is an Act dealing with matters of business, and its phraseology must be construed according to the ordinary business meaning of the words. The ordinary business meaning of the words "grain brought into the port of London for sale" appears to me to be "grain brought into the port of London for sale as grain." That is the necessary implication from the words used. If that be so, I think it is obvious that the grain in question was not brought into the port of London with intent that it should be sold as grain, but that it should be changed into that which is known in business as something else, and therefore that the case is not within the Act. For these reasons the appeal must be dismissed.

KAY L.J. I am of the same opinion. The question is as to the meaning of the words "grain brought into the port of London for sale." I think the illustration suggested by the defendants' counsel was perfectly good. Suppose one merchant

(1) 4 Price, 224.
(2) 48 J. P. 424.
(3) [1894] 2 Q. B. 720.

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sold to another so many hundredweight of maize or oats: would the delivery of the articles described in the special verdict be a good delivery under such a contract? Clearly not. I think the words of the Act must refer to the sale of "grain," and, if the grain is brought into the port of London, not for sale as grain, but to be manufactured into something which, if delivered under a contract for the sale of grain, would not satisfy that contract, the case is not within the Act. I do not think that the sale of any of the articles described would be the sale of the grain originally brought into the port of London. It seems to me that this grain was not brought in for sale as grain, but for the purpose of being manufactured into articles of commerce different from the grain, although they might among other things be composed of part of the grain. I do not agree with the contention that the only antithesis to "grain brought into the port of London for sale" is grain brought in for consumption. There are three cases. Grain may be brought in for sale; it may be brought in for consumption; or it may be brought in for manufacture into a different commercial article to be sold as such.

RIGBY L.J. I am of the same opinion. It seems to me that the words "grain brought into the port of London for sale" mean primarily, and unless they are qualified in some way by the context or otherwise, grain brought in for the purpose of being sold as and for what it is—namely, grain. It does not seem to me that the grain in question was brought in for that purpose. I do not think that by so construing the words we are adding any words to the Act. That there are cases in which grain is not brought in for sale is necessarily implied by the words of the Act. I think the test is whether there is a substantial change in the nature of the article before it is sold. We are not concerned here with the mere case of crushing and selling the crushed maize or oats. Even in that case I should be disposed to think that, as the maize or oats so crushed could not be sold under the description of "maize" or "oats," but would have had something done to them which changed their commercial character, the case would not be within the Act.

But in the present case I think it is plain that the intention was not to sell the grain, but to dispose of it in a profitable manner which was not by way of sale. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *H. H. Crawford (City Solicitor).*
Solicitors for defendants: *Wansey, Bowen & Co.*

E. L.

MOORE, APPELLANT *v.* PEARCE'S DINING AND REFRESHMENT ROOMS, LIMITED, RESPONDENTS.

1895 *Oct.* 25.

Margarine—"Exposed for Sale"—Margarine Act, 1887 (50 *&* 51 *Vict. c.* 29), *s.* 6.

The respondents were summoned for exposing margarine for sale by retail, without a label marked "Margarine" attached to each parcel, contrary to s. 6 of the Margarine Act, 1887. The respondents kept a refreshment-room, in which were posted notices that "Nothing but a mixture of the best Danish butter and margarine is sold at this establishment." Slices of bread, spread with a mixture of Danish butter and margarine, were sold for consumption on the premises, and also haddocks, on which was put margarine cut from a lump kept on a shelf. There were no labels either on the slices or on the lump of margarine:—

Held, that the margarine had not been exposed for sale by retail, within the meaning of s. 6, and therefore no offence had been committed.

CASE stated by a metropolitan police magistrate.

The Pearce's Dining and Refreshment Rooms, Limited, were summoned by the complainant, for that the said company, being dealers by retail in margarine, did expose for sale margarine without a label, as required by s. 6 of the Margarine Act, 1887. (1)

(1) 50 & 51 Vict. c. 29:—
Sect. 4 imposes penalties for offences against the Act.
By s. 6, "Every person dealing in margarine in the manner described in the preceding section" (s. 4) "shall conform to the following regulations: Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'Margarine' on the top, bottom, and sides, in printed capital letters, not less than three quarters of an inch square; and if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in

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The defendants carried on the business of venders of coffee, tea, and other refreshments, at the Wilberforce, Great Eastern Street, and other houses.

Amongst the articles sold by the defendant company were "slices," which were a slice of bread on which was spread a mixture of Danish butter and margarine.

The complainant, an officer of the Butter Association, visited the shop of the defendant company in Great Eastern Street on January 22, 1895, in company with David Toler, another officer of the same association.

The following was the material evidence:—

John Moore, the complainant, stated that on January 22, 1895, he went into the Wilberforce restaurant, and asked Mary Shearer, who was behind the counter, for two pots of coffee and bread-and-butter, and was supplied. He subsequently asked for four dry slices of bread and three pennyworth of butter. Mary Shearer went to the counter, and cut off a piece off a lump on the shelf. He could see the lump from where he stood. There was no label of margarine on it. The manager, William Murray, said, "What margarine we have cannot be supplied to take out. We will put any amount you like on bread; we don't supply any to be taken out from any of our branches." Moore said he wanted it for analysis, and offered threepence for three pennyworth from the lump which was exposed on the shelf. The manager repeated that he would not sell it to take out, and pointed out to Moore a notice, hanging conspicuously over the plates on which the slices were, containing the following announcement: "Pearce's Dining and Refreshment Rooms, Limited. Notice. Slices $\frac{1}{2}d.$ each. Nothing but a mixture of the best Danish butter and margarine is sold at this establishment," and said that they sold margarine and butter mixed at all their branches. Except these notices he

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such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a half inches square, 'Margarine'; and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'Margarine.'"

saw no labels of margarine. He saw no notice on the lump on the shelf to say that it was margarine. The manager declined to serve him. The lump of butter asked for never was delivered to him. He saw the notices throughout the shop. He did not see any notice upon the plates with the slices. The notices as to "slices" were conspicuous.

David Toler said he went with Moore to the Wilberforce, and heard him ask for the three pennyworth. He saw no margarine label attached to the lump. The manager called Moore's attention to the "slices labels." He saw no margarine labels at the Great Eastern Street shop.

For the defence the following witnesses were called :—

John Pearce, managing director of the defendant company: "'Slices' are mostly cut behind the counter, and placed in a large dish on the counter, from which customers help themselves. The margarine would be only for spreading, and was not sold in the lump. The 'slices labels' were hanging over the slices. The mixture consists of Danish butter and margarine. It is only sold to be spread. We could not have a label on the lump. There was no label on the plate of slices with the word 'margarine,' or on the lump at the back."

William Murray, manager at the Wilberforce: "Moore and Toler came in on January 22, and asked for coffee, and were served. Moore asked for three pennyworth of butter, and he (Murray) said he could not sell it, except on slices. There were four 'slices labels' in the shop. A customer as a rule helps himself. It is sold spread. Nothing at the back of the counter is for sale. It is sold on slices, and some is given away with 2*d.* haddocks."

Mary Shearer, assistant at Great Eastern Street: On January 22 saw Moore and Toler. They asked for coffee and two slices. Moore then asked her for three pennyworth of butter. She said "It is a mixture of Danish butter and margarine." Moore said, "Oh, give me that." She heard the manager tell Moore that they did not sell butter. She said to Moore that they only sold bread and margarine. She cut a piece of "butter" off, and put it on a small plate, and put it at the end of the bar for the haddocks. The lump from which she cut off the piece was for

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sale with the haddocks, or to be spread on bread. The haddocks were sold no cheaper without the margarine.

On the part of the complainant it was contended that the lump of Danish butter and margarine was margarine within the meaning of the Margarine Act, 1887, and that therefore both the lump on the shelf, the slices on the plate, and the haddocks were exposed for sale by retail, and therefore ought to have attached a label, as provided by s. 6. On the part of the defendants it was contended that they did not sell margarine by retail, but only as "slices," and that they were not bound to comply with the provisions of the Margarine Act.

The magistrate dismissed the summons, being of opinion that neither the lump on the shelf, the "slices" on the plate, nor the margarine with the haddocks, required to have a label attached under s. 6.

Morton Smith (*Dickens, Q.C.*, with him), for the appellant. The decision of the magistrate was wrong, and the respondents ought to have been convicted. The margarine was "exposed for sale by retail," within the meaning of s. 6 of the statute, and therefore a label ought to have been attached. Even if the contention that every slice spread with margarine, or every plate containing the slices, ought to have had a label, cannot be supported, still the lump of margarine on the shelf was clearly exposed for sale, and ought to have had a label. The words of the statute are purposely made as wide as possible, in order to include every possible case, so as to insure protection to the public against deception. There can only be two kinds of sale, wholesale and retail, and the expression "sale by retail" includes every sale for consumption by the purchaser, where the article supplied is not intended to be sold again, and therefore covers the present case. [He referred to *Crane* v. *Lawrence*. (1)]

John Ogle, for the respondents, was not called on.

LORD RUSSELL of KILLOWEN C.J. This case arises under the Margarine Act, 1887 (50 & 51 Vict. c. 29). That statute is directed to secure an important public object, for it is intended

(1) 25 Q. B. D. 152.

to protect the public against any deception with regard to the articles they buy. In the present case, the persons who were charged with an offence against the statute have acted entirely aboveboard, and there has been no attempt at deception; but the question remains whether an offence has been committed, within the meaning of the Act of Parliament. Sect. 4 provides the penalties for offences against the Act, and s. 6 contains the provisions creating the offences, and it is with s. 6 that we have to deal. We must look at the middle clause of that section, for the respondents were charged with having exposed margarine for sale without a label attached as required by the Act. The section provides, first, for the marking of packages containing margarine; but the present case does not come under that provision. Then the section continues in these words: "and if such magarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a half inches square, 'Margarine.'" The question for our determination is, whether that provision has been contravened. I am of opinion that it has not. If we look at the facts stated in the case, it appears that the respondents do not sell margarine to their customers to take away; on the contrary, the establishment is conducted strictly as a refreshment-house. Notices are posted in the shop in these words: "Slices ½*d.* each. Nothing but a mixture of the best Danish butter and margarine is sold at this establishment." Slices of bread are sold to customers with the margarine spread upon them, and the margarine is also sold with haddocks supplied to customers for consumption on the premises; but in such cases, whether the margarine is used or not, the price charged for the haddocks is the same. If a piece had been cut off from the lump of margarine, and had been supplied to a customer to take away with him, I should have thought that there might be much to be said in support of the contention put forward on behalf of the appellant; but in the present case the appellant was promptly told that the respondents did not sell the margarine to be taken away. The question comes to this, Was the case one in which magarine was exposed for sale by retail, within the

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meaning of s. 6 of the Act? In order to arrive at a conclusion as to this one must read the concluding portion of the section, which provides that "every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'Margarine.'" That shews what the character of the sale intended to be dealt with by the section is; and it is perfectly obvious that the machinery provided by the section is inapplicable to the course of business as it is carried on at this establishment. It would be absurd to apply the provision as to using a wrapper to each separate piece of margarine, when spread on the bread, or used with a haddock. This difficulty drove the appellant to contend that the lump of margarine ought to have had a wrapper on it. In order to support that contention it must be made out that the lump was exposed for sale by retail. For the reasons which I have given, I have come to the conclusion that there was not any exposure for sale by retail, or any sale by retail, within the meaning of s. 6, and that our judgment ought to be in favour of the respondents.

CAVE J. I am of the same opinion on the same grounds.

Judgment for the respondents.

Solicitor for appellant: *C. Urquhart Fisher.*
Solicitor for respondents: *Thomas Charles.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1895
Nov. 5

HODDER *v.* WILLIAMS.

Sheriff—Execution—Fi. fa.—Breaking outer Door—Building not Dwelling-house.

The sheriff may, for the purpose of executing a writ of fieri facias, break open the outer door of a workshop or other building of the judgment debtor, not being his dwelling-house or connected therewith.

APPEAL from a judgment of Vaughan Williams J.

The facts were as follows. The action was for trespass and wrongful seizure of goods. The plaintiff, who was a coach-builder, for the purposes of his business occupied buildings as a workshop and for storage of goods, no one living there. The defendant was the sheriff of the county of Dorset. A writ of fieri facias having been issued upon a judgment against the plaintiff, the sheriff's officer proceeded to the above-mentioned premises for the purpose of executing the writ, and, finding the outer door locked, requested the plaintiff, who was outside, to open it. The plaintiff refusing to do so, he broke it open and seized goods of the plaintiff upon the premises—which were the acts complained of. The learned judge held that he was justified in doing so under the writ, and gave judgment for the defendant.

Macaskie, for the plaintiff. The reasons given for the doctrine of *Semayne's Case* (1) apply to a building like a shop or warehouse, in which the owner or his servants would be likely to be when it is forcibly entered, as much as to a dwelling-house. There is no reason for construing the maxim given in the first resolution of the judges in that case as referring to a dwelling-house only. In the case of a shop a forcible entry is as likely to lead to a breach of the peace as in that of a dwelling-house. The case of *Penton* v. *Browne* (2) does not appear to have really decided that the sheriff can break open the outer door of any building not a dwelling-house for the purpose of executing a

(1) 5 Rep. 91 a; 1 Sm. L. C. 9th ed. 115. (2) 1 Sid. 186; 1 Keb. 698.

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fi. fa. From the report of that case in Keble's Reports it appears that the outhouse broken open did not belong to the judgment debtor, but to another person. The law as laid down in *Semayne's Case* (1) is that, where the judgment debtor's goods are removed to the house of another to prevent a lawful execution, the sheriff may, after denial on request, break the door; and from the report in Keble it would appear that the ground of the decision was that there was in the case of an isolated outhouse in a field no place where such a request could be made. A barn or outhouse of an agricultural character in a field away from any dwelling and only occasionally visited by the owner is wholly different for this purpose from a shop or warehouse, in the case of which the owner or his servants will probably be on the premises when the entry is effected; and therefore the same kind of mischief may be caused by forcibly entering as in the case of a dwelling-house. If the defendant's contention is correct, the sheriff's officer could break open the door of a bank in the city of London after closing hours in order to execute a writ of fi. fa. No doubt there are statements in the text-books on the subject based on *Penton* v. *Browne* (2); but they really do not go further than saying that such a building as a barn or an outhouse may be broken open by the sheriff. In *American Concentrated Must Corporation* v. *Hendry* (3), Bowen L.J. disapproved of *Penton* v. *Browne*. (2) [He also cited *Brown* v. *Glenn* (4); *Ryan* v. *Shilcock*. (5)]

Channell, Q.C., and *E. U. Bullen* (*Muir Mackenzie* with them), for the defendant. The case of *Penton* v. *Browne* (2) decided this point; or at any rate it has been supposed for more than two hundred years to have decided it. All the text-books on the subject appear to treat the doctrine of *Semayne's Case* (1) as confined to a dwelling-house or building connected therewith: see note in Smith's Leading Cases to *Semayne's Case* (6); and Lord Blackburn in the case of *Hobson* v. *Thelluson* (7) treated this as

(1) 5 Rep. 91 a; 1 Sm. L. C. 9th ed. 115.
(2) 1 Sid. 186; 1 Keb. 698.
(3) 62 L. J. (Q.B.) 388.
(4) 16 Q. B. 254.
(5) 7 Ex. 72; 21 L. J. (Ex.) 55.
(6) 1 Sm. L. C. 9th ed. at p. 123.
(7) L. R. 2 Q. B. 642; 36 L. J. (Q.B.) 302.

well-settled law. When in a matter relating to every-day practice a proposition has been treated as being law for such a long period of time, it becomes the law. The Court will not overrule a decision which has stood for so many years as *Penton* v. *Browne* (1), whether they think it was rightly decided originally or not. The reasons given by Lord Mansfield for the doctrine of *Semayne's Case* (2) in *Lee* v. *Gansel* (3) shew that he thought that it was confined to the case of a dwelling-house. The effect of what was said by Bowen L.J. in *American Concentrated Must Corporation* v. *Hendry* (4) was not that he did not think the decision in *Penton* v. *Browne* (1) to be law, but only that it was a departure from the older law on the subject. In *Brown* v. *Glenn* (5) Lord Campbell appears to treat that decision as law. [They cited Watson on the Office of Sheriff, pp. 75, 77; Impey's Office of Sheriff, p. 120; Bacon's Abridgment, title Sheriff, N. 3.]

Macaskie, in reply. In the case of *Hobson* v. *Thelluson* (6) the report in the LAW REPORTS, which was presumably revised by the learned judge, does not represent Lord Blackburn as directly stating that the sheriff may break into a warehouse. If he said what is reported in the *Law Journal* on that subject, it was only obiter, because it was held that, assuming that the sheriff could have broken open the warehouse, there was no negligence on the part of the defendant in that case in not having done so at once.

LORD ESHER M.R. Where there is a decision which has stood for more than two hundred years in respect of a subject-matter constantly arising in practice, the Court does not overrule it unless absolutely obliged to do so; more especially, when the law as laid down by that decision has been handed down for a long period through a series of text-books by careful writers, and the general principle on which the decision was founded has been often recognised by eminent judges. In such a case, even if the Court did not agree with the decision, it would not overrule it. The first decision directly bearing on the point is

(1) 1 Sid. 186; 1 Keb. 698.
(2) 5 Rep. 91 a; 1 Sm. L. C. 9th ed. 115.
(3) 1 Cowp. 1.
(4) 62 L. J. (Q.B.) 388.
(5) 16 Q. B. 254.
(6) L. R. 2 Q. B. 642; 36 L. J. (Q.B.) 302.

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Penton v. *Browne*. (1) In that case the judges acted on the view they took of the effect of *Semayne's Case* (2); and it is clear that they held that the privilege mentioned in that case existed only in respect of a dwelling-house. It is said in that case to be based on the maxim "every man's house is his castle." It seems clear that "house" in that maxim means "dwelling-house" and does not include other buildings such as barns or outhouses not connected with a dwelling-house, which may be broken open in order to levy an execution. It is so stated in the note in Smith's Leading Cases to *Semayne's Case* (3), and the case of *Penton* v. *Browne* (1) is cited as authority for that proposition. Lord Mansfield, in the case of *Lee* v. *Gansel* (4), clearly adopts that view. The reason which he gives for the existence of the privilege is that, if the outer door of a man's house were broken open by process, it would leave the family within unprotected from thieves and robbers. The mischief which he is there dealing with is plainly only applicable to the case of a dwelling-house. In *Brown* v. *Glenn* (5) Lord Campbell C.J. appears to treat the decision in *Penton* v. *Browne* (1) as good law. In *Hobson* v. *Thelluson* (6) Lord Blackburn took the same view. In all the text-books on the subject the law is laid down in the same manner. None of the authorities on the subject draw any such distinction as was suggested in argument between a building such as a shop or warehouse and a barn or outhouse. The only distinction drawn is between a dwelling-house and a building which is not a dwelling-house. I am not prepared to overrule a doctrine which has been accepted for so many years. I therefore think that the judgment was right, and that this appeal must be dismissed.

LOPES L.J. I am of the same opinion. The doctrine that the sheriff cannot break open the door of the judgment debtor's dwelling-house is of ancient date, and proceeded on the principle that a man and his family shall be protected in the occupation of

(1) 1 Sid. 186; 1 Keb. 698.
(2) 5 Rep. 91 a; 1 Sm. L. C. 9th ed. 115.
(3) 1 Sm. L. C. 9th ed. 115.
(4) 1 Cowp. 1.
(5) 16 Q. B. 254.
(6) L. R. 2 Q. B. 642; 36 L. J. (Q.B.) 302.

a dwelling-house. The maxim is well established that "every man's house is his castle." It has frequently been stated as the law that this privilege only extends to the dwelling-house, and not to a barn or other building not connected with or within the curtilage of the dwelling-house. The leading authority on the subject is *Penton* v. *Browne*. (1) That case is more than two hundred years old; it has been referred to in every text-book on the law relating to sheriffs; and it has been recognised as law by Lord Mansfield, Lord Campbell, and Lord Blackburn. To interfere with the law so laid down at the present time would, I think, be very wrong and mischievous. The doctrine relied upon has never been supposed to apply to anything but a dwelling-house, and has never operated to prevent a sheriff from breaking open the door of any building not being a dwelling-house or connected with a dwelling-house.

KAY L.J. We are not dealing with the case of a distress, but that of an execution levied by the sheriff under a writ of fieri facias issued upon a judgment. Lord Campbell, in the case of *Brown* v. *Glenn* (2), says that "a distinction may reasonably be made between the powers of an officer acting in execution of legal process, and the powers of a private individual who takes the law into his own hands and for his own purposes." The question here is whether a sheriff in the execution of process can break open the outer door of a shop or warehouse in which goods of the judgment debtor are stored. In *Penton* v. *Browne* (1), decided in the time of Charles II., it was held that the door of an outhouse containing goods of the debtor, not being a dwelling-house, or within the curtilage of a dwelling-house, might be broken open by the sheriff. That case is cited in the note to *Semayne's Case* (3) in Smith's Leading Cases, where it is stated that "The maxim that 'a man's house is his castle' only extends to his dwelling-house; therefore a barn, or outhouse, not connected with the dwelling-house, may be broken open in order to levy an execution: *Penton* v. *Browne*, 1 Sid. 181, 186; but not to make a distress for rent: *Brown* v. *Glenn*, 16 Q. B. 254." It is admitted

(1) 1 Sid. 186; 1 Keb. 698. (2) 16 Q. B. 254.
(3) 1 Sm. L. C. 9th Ed. 115.

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that in all the legal text-books on the subject this is stated to be the effect of *Penton* v. *Browne*. (1) In *Brown* v. *Glenn* (2) Lord Campbell refers to that case thus: "In *Penton* v. *Browne* (1) it was decided on demurrer that the outer door of an outhouse might be broken open for the purpose of executing a fieri facias." He treats that, therefore, without disapproval as being the law established by that case. In *Hobson* v. *Thelluson* (3), where the question was whether the sheriff was guilty of negligence in not executing a fi. fa. before the debtor had executed a deed of assignment for the benefit of creditors, according to the report in the *Law Journal* Lord Blackburn says: "I do not think that the sheriff's officer was bound to go off at once and take a crowbar to break open the doors, although no doubt that might have been done, as the goods were in a warehouse, and not in a dwelling-house." It has been pointed out that, in the report in the LAW REPORTS of what the learned judge said, he does not so distinctly state that the sheriff could break open the outer door of a warehouse; but what he is there stated to have said comes to very much the same thing, for he is there made to say that the sheriff's officer "was not bound to break open the door of the warehouse at once without further inquiry, in the absence of any direction from the execution creditor to proceed with the utmost despatch." Mellor J., in the same case, says: "I do not think the officer is required at once to break open a warehouse which he finds fastened." If the sheriff could not break open the door of a warehouse at all, these judgments would be irrational, for he could not then possibly be guilty of negligence in the matter, whereas the judgments are based on the proposition that he was not bound to do it at once. It seems to me that the effect of both the reports is to shew that the judges thought that the sheriff could break open the door of a warehouse. It was said that Bowen L.J., in the case of *American Concentrated Must Corporation* v. *Hendry* (4), had disapproved of the decision in *Penton* v. *Browne*. (1) He said, no doubt, that he considered it a departure from older law; but he did not say, as

(1) 1 Sid. 186; 1 Keb. 698.
(2) 16 Q. B. 254.
(3) L. R. 2 Q. B. 642; 36 L. J. (Q.B.) 302.
(4) 62 L. J. (Q.B.) 388.

I understand him, that it was not law, or that at this time of day it could be overruled. Although I think that the observations of that learned judge are always of great value, if he meant that, I could not agree with him. I think that the law as laid down in that case has been established by so long a course of practice that it would be impossible now to overrule it. For these reasons I think that the learned judge below came to a right conclusion, and this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Nicholson, Graham & Graham, for R. Tucker, junr., Bridport.*

Solicitors for defendant: *Lovell, Son & Pitfield, for Symonds & Son, Dorchester.*

E. L.

[IN THE COURT OF APPEAL.]

SOUTH STAFFORDSHIRE TRAMWAYS COMPANY *v.* EBBSMITH.

Practice—Discovery—Inspection of Bankers' Books — Privilege—Entries not relevant—Account of person not party to Action—Bankers' Books Evidence Act, 1879 (42 & 43 *Vict. c.* 11), *s.* 7.

The jurisdiction to order inspection of entries in bankers' books under s. 7 of the Bankers' Books Evidence Act, 1879, ought to be exercised in conformity with the general law as to discovery, by which a party to an action is entitled to refuse discovery of entries which he swears to be irrelevant.

Therefore, where the defendant in an action stated on affidavit that entries in his banking account were irrelevant to the matters in dispute:—

Held, that an order for inspection of those entries before the trial ought not to be made under the above-mentioned Act.

Semble, inspection of entries in a banker's books relating to an account kept in the name of a person not a party to the action can be ordered under the Bankers' Books Evidence Act, 1879, where the Court is satisfied that those entries will be admissible in evidence against a party to the action at the trial; but such an order ought not to be made without notice to such person, nor then unless very strong grounds are shewn for thinking that there are entries in the account which are material to the case of the party asking for inspection.

APPEAL from an order of Hawkins J. at chambers, which reversed an order of a master giving the plaintiffs leave to

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inspect entries in bankers' books under the Bankers' Books Evidence Act, 1879, s. 7.

The plaintiffs were a tramway company incorporated by Act of Parliament, which under the provisions of the Act took over the property and rights of a previously existing company called the South Staffordshire and Birmingham District Steam Tramways Company, Limited. The plaintiffs by their statement of claim alleged that the defendant had been a promoter of and solicitor to the last-mentioned company, and as such had occupied a fiduciary position towards the company, and that in breach of his duty to them he had made secret profits out of the company; that he had caused to be registered a company called the Dickinson Tramway Appliance Company, Limited, which was a sham company, and in fact himself, the signatories to its memorandum of association being his partners in business or clerks, its secretary his cashier, and 1500 out of the 1507 shares in the company issued being held by him; that certain worthless patents which had been bought up by him for small sums were assigned by him to the Dickinson Tramway Appliance Company; and that he then procured the South Staffordshire and Birmingham District Steam Tramways Company and the plaintiffs to purchase articles the subject-matter of the patents and licences to use the patents at exorbitant prices, and without any disclosure of the extent and nature of his interest in them, and without any regard for the interest of the South Staffordshire and Birmingham District Steam Tramways Company and the plaintiffs; and they claimed damages, an account of the profits made by the defendant in respect of the matters alleged, a rescission of the plaintiffs' contracts with regard to the patents, and a return of all sums paid to the defendant in respect of them.

The plaintiffs applied at chambers under the Bankers' Books Evidence Act, 1879, s. 7, for an order that they might be at liberty to inspect the books of the bank at which the defendant and the Dickinson Tramway Appliance Company had kept accounts for the years 1885 to 1894, both inclusive, containing entries of the accounts of the defendant and of the accounts of the Dickinson Tramway Appliance Company, Limited, and to

take copies of such entries, on the ground that it was essential for the working out of the evidence in support of their case that they should have such inspection.

The defendant made an affidavit in which he swore that, with the exception of three items, of which he produced copies certified to be correct by an official of the bank (1), there were no entries in his account of which inspection was sought relating to the matters in question in the action.

Affidavits were filed for the plaintiffs to the effect that the signatories to the memorandum of association of the Dickinson Tramway Appliance Company were the defendant's partners, cashier, and clerks, and that the defendant was originally and continued for some years the holder of 1500 out of the 1507 shares in the company issued. It appeared, however, that his interest in these shares had been subsequently transferred to a company called the Corporate Trust, Limited; and there was a conflict of evidence on the affidavits as to whether this really took place in 1889 or not till 1893. As will be seen, the grounds upon which the judgment was given render it unnecessary for the purposes of this report to give particulars of the statements contained in the affidavits with regard to the relations between the defendant and the Dickinson Tramway Appliance Company. The master made the order for which the plaintiffs applied, but the learned judge on appeal reversed his decision.

Sir F. Lockwood, Q.C., and *Scrutton*, for the plaintiffs. It is submitted that there is clearly jurisdiction under the statute to order inspection of the defendant's account, and the plaintiffs ought to be allowed to have inspection of it. The bank could have been compelled by the plaintiffs to produce the books containing that account at the trial on a subpœna duces tecum. The object of the Act is to obviate the necessity for such production, and any party who had that right can now obtain an order for leave to inspect and take copies of entries in the books:

(1) It should not be assumed that this was the correct mode of procedure. No objection was offered by the plaintiffs' counsel to this mode of giving inspection of the entries admitted to be relevant, the contest really being as to the right of inspection of the entries which the defendant swore to be irrelevant.

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In re Marshfield (1); *Arnott* v. *Hayes.* (2) There is also jurisdiction to order inspection of the account of the Dickinson Tramway Appliance Company. It is submitted that the effect of the affidavits is to shew that that company was substantially identical with the defendant, at any rate down to 1893. Therefore, inspection ought to be allowed of the account down to that date: *Howard* v. *Beall* (3); *Perry* v. *Phosphor Bronze Co.* (4)

G. S. Bower, for the defendant. It has been held by the Court of Appeal that it was not intended by the Bankers' Books Evidence Act, 1879, to give an increased right to discovery, or to deprive a party to a legal proceeding of his right to refuse discovery of entries in his bank-book on the ground that they are irrelevant to the matters in dispute: *Parnell* v. *Wood.* (5) The authorities clearly shew that on an application for discovery the affidavit of the party against whom inspection is asked for to the effect that a document or a portion of a document is irrelevant must be accepted as conclusive. This application is in substance the same as that refused in *Parnell* v. *Wood.* (5) There certain entries in the plaintiff's pass-book were sealed up, and it was sworn that they were irrelevant. It was held that the applicants could not get behind the affidavit of the plaintiff by obtaining inspection of the bank-books under the Act. The defendant here has done that which is equivalent to what the plaintiff did in that case. He admits certain entries, of which he gives inspection, to be relevant, and swears that all other entries in the account are irrelevant.

[KAY L.J. Ought not the defendant in strictness to give inspection of his pass-book, having sealed up the entries which he swears to be irrelevant?]

The defendant could do that if required; but no question seems to be really raised as to the entries which are admitted to be relevant. The object of the Act was to prevent the inconvenience to bankers of having to produce their books in court. It was never intended that one party to an action should be given a roving commission to inspect the other party's account to see if

(1) 32 Ch. D. 499.
(2) 36 Ch. D. 731.
(3) 23 Q. B. D. 1.
(4) 71 L. T. 854.
(5) [1892] P. 137

he can find any entry which may help him in the action. [He also cited *Emmott* v. *Star Newspaper Co.* (1)]

Lochnis, for the Dickinson Tramway Appliance Company. The Court has no jurisdiction under the Act to order the inspection of the banking account of a person not a party to the action. It is submitted that there is no evidence that the defendant and the company were identical, at any rate after 1889. It is quite clear that at the present time they are not identical. Apart from the Act, there is no power before the trial to order discovery of documents in the possession of a third party, and it was not intended by the Act to give that power. The company could not be compelled before the trial to make discovery of documents in their own possession. The effect of ordering the inspection asked for is to compel discovery of the documents of a third person not a party to the action because he happens to have a banking account.

Sir F. Lockwood, in reply.

[LORD ESHER M.R. What entries material to the plaintiffs' case do the plaintiffs suggest the existence of in the Dickinson Tramway Appliance Company's account?]

It is suggested that entries will be found which will assist the plaintiffs in shewing that, with regard to the patents which were bought up by the defendant for nominal sums, and then transferred by him to the Dickinson Tramway Appliance Company for much larger sums, the transactions were shams, and that the moneys ostensibly paid by the South Staffordshire and Birmingham District Tramways Company to the Dickinson Tramway Appliance Company really went to the defendant—in fact, that that company was a mere conduit pipe in the matter.

LORD ESHER M.R. In this case an application was made under the Bankers' Books Evidence Act, 1879, s. 7, for an order that the plaintiffs might be at liberty to inspect the account of the defendant, and also that of a company called the Dickinson Tramway Appliance Company, Limited. This application was refused by the judge at chambers, and from his decision the plaintiffs have appealed to this Court. I will deal first with the

(1) 62 L. J. (Q.B.) 77.

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application in relation to the account of the defendant. I have no doubt that the Court has jurisdiction under the section to make the order asked for; but we have to consider and endeavour to lay down the rule of conduct by which the Court ought to be governed in exercising that jurisdiction. This is an application for inspection before the trial; and it appears to me that, where such an inspection is asked for, the conduct of the Court in the exercise of this jurisdiction ought to be regulated by the general rules laid down by the decisions in relation to inspection of documents before the trial. It was the rule of the Court of Chancery, where such an inspection of documents was asked for, that the Court granted it subject to this, namely, that, if in answer to the application the defendant pledged his oath to the fact that certain entries were irrelevant to the matters in dispute, the Court accepted that answer, leaving the defendant exposed to the risk of a prosecution for perjury, if it was untrue. I think that in exercising its jurisdiction under the 7th section of the Bankers' Books Evidence Act, 1879, the Court ought to be governed by the same rule. The defendant has taken upon himself to pledge his oath that the items which he gives from his banking account are the only items relevant to the matters in issue between him and the plaintiffs; and I think that for the time the Court must accept that statement on oath, and, as he cannot at the present stage of the proceedings be cross-examined upon it, the Court must act upon that statement. The Court must, therefore, refuse to order the inspection applied for before the trial, leaving it to the judge at the trial to make such order as he may think fit in the matter.

With regard to the application for inspection of the banking account of the Dickinson Tramway Appliance Company, in that case also I think it clear that the Court has jurisdiction to order such an inspection for the reasons given by Mathew J. in *Howard* v. *Beall* (1); but I think that is a jurisdiction which ought to be exercised with great caution. The application is for an order to inspect before the trial an account which is primâ facie not that of a party to the suit. I am disposed to think that the rule of conduct which the Court would observe in relation to such an

(1) 23 Q. B. D. 1.

application—though it is impossible to define it exhaustively—would be that, if the Court were satisfied that in truth the account which purported to be that of a third person was the account of the party to the action against whom the order was applied for, or that, though not his account, it was one with which he was so much concerned that items in it would be evidence against him at the trial, and there were no reason for refusing inspection, then they might order the inspection; but, unless they were so satisfied, they ought not to do so. In this case I am very strongly inclined to believe that the account of which inspection is sought was, up to a certain date, really the account of the defendant, or contained items which would be admissible in evidence against him; but I think with regard to such an application for inspection as this the Court ought to be very cautious, and to require more than that to be shewn. I think that the party asking for the inspection ought to be able to shew the Court very strong grounds for suspicion, almost amounting to certainty, that there are items in the account which would be material evidence against the defendant upon the matters in issue. I requested the counsel for the plaintiffs to tell me what grounds he had for the suggestion that there were items of that character in this account. I think the answer which he gave was too general. He did not appear to me to be able to fix upon any definite items in the account which would help the plaintiffs; and no items suggest themselves to my mind which would furnish the plaintiffs with facts beyond those of which they are already in possession. It seems to me that, if we made the order sought for, we should be granting an application of a fishing character, made by the plaintiffs with a view to obtaining an opportunity of trying to find in the account items favourable to their case, but the existence of which they have at present no sufficient ground for suspecting. Under those circumstances I do not think we ought to overrule the discretion exercised by the learned judge at chambers. For these reasons I think the appeal must be dismissed.

KAY L.J. Prior to the Bankers' Books Evidence Acts the Court had no power to order the inspection before the trial

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of the books of bankers who were not parties to the action. The Bankers' Books Evidence Act, 1879, amongst other things, enables the Court, where a customer of a bank is a party to an action, to order inspection of his account prior to the trial. The rule as to inspection of documents has always been that it is granted subject to the liberty of the person against whom it is asked for to seal up any part of a document which he swears by affidavit made for the purpose not to be relevant to the issues in the action, and that the other party cannot get behind the statement so made by him upon oath. It is obvious that, if the statement so made could be controverted, there might be a great contest on affidavits on the threshold of the litigation before the case came on for trial. Therefore the Court made it a rule that there could not be any contest with regard to the truth of the statement so made, but it must be accepted as true so far as the question of inspection was concerned. The only exception to that rule was where, from some other document brought before the Court in the cause, it appeared that the affidavit was inaccurate, and that some of the items which were sealed up ought to be inspected. No such exception applies in the present case. The question is whether that rule is altered by the Act. It would be very strange if it were. I quite agree with what was said in *Parnell* v. *Wood* (1), to the effect that it was not intended by the Act to do away with any privilege which a litigant possessed by virtue of which he was entitled to resist or limit the extent of inspection, but only to give inspection subject to such privilege in a certain case where it could not have been given before. The defendant in this case has made an affidavit setting out certain items in his banking account, and he swears that those are the only items which are relevant to the issues in the action. I see no reason for disbelieving that statement at present, and I think we must accept it. For these reasons it appears to me that the appeal must be dismissed so far as regards the inspection of the defendant's account.

There is a second question of great importance. The application is not merely for inspection of the defendant's account, but also for inspection of the account of the Dickinson Tramway

(1) [1892] P. 137.

Appliance Company, which is not a party to the action. It was sought to get over that prima facie difficulty by shewing that, although that company being a corporation was not in law personally identical with the defendant, yet, as he had substantially all the shares in the company and was really the only person interested in it, the company was practically identical with himself, and their account was his; and it was argued that it was just as if he had kept an account with a bank in the name of a son or a friend, and there had been an application to inspect that on evidence shewing that the person in whose name the account was kept was practically identical with the party to the action. I do not think it necessary for the purposes of this case to give any decided opinion on that point; but I do not at present see any reason for differing from the opinion expressed in *Howard* v. *Beall* (1), to the effect that, if such a case could be made out, the Court could order inspection. It has been said, however, in the cases on the subject, that the Court ought to act with great caution when asked to order inspection of the account of a party to the action under this Act; and it is obvious, if that be so, that they ought to act with still greater caution when the account of which inspection is sought is that of some person who is not a party to the action. I should say that the Court would never dream of ordering such inspection without having that person before them. No difficulty, however, arises on that score in the present case, because the company has been brought before us and has been heard. I think that strong grounds have been shewn for suspecting that for some time, at any rate, the defendant being the owner substantially of all the shares in the company, he practically was the company. But the evidence is conflicting on the question when his ownership of these shares ceased. According to the affidavits on one side, it would appear that he ceased to own the shares in 1889; whereas, according to the affidavits on the other side, he continued to be the real owner of them till 1893. On this state of affairs it seems to me very doubtful whether the inspection asked for could be given. But I do not think we are driven to decide that point, because I agree with the Master of the Rolls

(1) 23 Q. B. D. 1.

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that, before we grant inspection of the account of the company, the plaintiffs ought to be able to shew, not only that the company can be identified with the defendant, but also that there are entries which will probably be in the account—on which a finger can almost be laid—material to the questions at issue in the action, and which will be evidence against the defendant at the trial. I do not think they have succeeded in shewing that, and I am not satisfied that there are such entries. I think, therefore, that we should be acting rashly in granting the inspection asked for at this stage of the litigation. I do not say anything with regard to what may take place at the trial. By what we are now doing we do not intend to interfere with the power of the judge at the trial to make any order he may think fit with regard to the production of these books or a certified copy of entries in them. All we say now is that we think the learned judge at chambers was justified in the exercise of his discretion in refusing inspection of these accounts before the trial. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Munns & Longden.*

Solicitors for defendant: *Walter Webb & Co.*

Solicitors for Dickinson Tramway Appliance Company: *Walker, Son & Field.*

E. L.

[IN THE COURT OF APPEAL.]

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LILES *v.* TERRY AND WIFE.

Solicitor and Client—Gift by Client—Presumption of Undue Influence—Absence of Independent Advice.

The client of a solicitor, without independent advice, made a voluntary conveyance to him of leasehold premises in trust for herself for life, and after her death in trust for his wife, who was her niece, for her separate use absolutely :—

Held, that, the well-settled rule of equity being that such a gift could not be supported, unless the donor had competent and independent advice in making it, the conveyance must be declared void.

APPEAL from the judgment of Charles J. without a jury.

The action was brought to set aside a deed dated October 18, 1892, and made between the plaintiff Jane Liles of the one part, and John Frederick Terry (the male defendant) of the other part, whereby the plaintiff, in consideration of the natural love and affection she had towards Mary Rose Terry (the female defendant), assigned to the said J. F. Terry two leasehold houses in the parish of St. Mary, Newington, subject to the payment of the rent and performance of the covenants under the lease, in trust to pay the rents and profits to the plaintiff during her life, and after her death to her sister Frances Hogg, widow (who had died before the action was brought), during her life, and after her death upon trust for the said Mary Rose Terry for her separate use and benefit absolutely.

The facts were as follows.

The male defendant was a solicitor. The female defendant was his wife and the niece of the plaintiff. It appeared that the plaintiff, who was a spinster of about seventy-seven years of age, had been engaged in litigation with respect to property of which the houses assigned by the deed in question formed part, and had said that she would leave the houses by will to Mrs. Hogg, the female defendant's mother, for life, and after her death to the female defendant, if the male defendant would act as her solicitor in the matter without making any charge, and he had

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accordingly so acted. Subsequently the plaintiff saw the male defendant and told him that she desired to make her will. On October 18, 1892, she went to a boarding-house in London, at which the male defendant was then staying, for the purpose of executing her will. The defendant then produced a will which he had caused to be prepared, and she executed it. By this will, which did not mention the houses in question, the plaintiff, after bequeathing certain legacies, devised and bequeathed the residue of her real and personal property to her four nieces. The male defendant then produced the deed in question and asked her to sign it, which she did. She stated in her evidence that she asked what it was, and he told her that it was a separate deed for the two houses; and that she then said that she did not understand why it was not all in one paper. She further stated that she was not asked whether she would have independent professional advice in the matter, and that the deed was not read over or its contents explained to her, and that she was not told that the deed was irrevocable, and did not understand it to be so. On the other hand, a witness named Pearson, an architect, unconnected with the parties, who was staying at the boarding-house and was present when the deed was executed, was called for the defendants, and stated that the male defendant told the plaintiff that one of the documents which he had brought was a will, and the other a deed, and explained the effect of them to her, and that she then signed them and said she was glad the matter was settled. The male defendant was not able to give evidence at the trial on account of his mental condition. It was contended for the plaintiff at the trial that the deed was invalid, being a voluntary conveyance in favour of the wife of the assignor's solicitor; and further, that, even if it were not a voluntary conveyance, such a conveyance was invalid, the assignor not having had independent professional advice in making it.

The learned judge came to the conclusion upon the evidence that there was nothing to shew any undue influence or unprofessional conduct on the part of the male defendant; that the plaintiff had had the matter thoroughly explained to her, and that her intention was to have it carried out by the deed she

executed. He held, on the authority of *Price* v. *Jenkins* (1), that the assignment was not voluntary, because it imposed on the assignee a liability in respect of the rent of the premises and the covenants in the lease; and that, there having been nothing in the nature of undue influence or deception, but the whole matter having been fully and fairly explained to the plaintiff, who, in the learned judge's opinion thoroughly understood what she was doing, and did it with the intention of benefiting her niece, the deed was not invalid. He therefore gave judgment for the defendants.

C. L. Attenborough, for the plaintiff. The learned judge was wrong in treating this as not being a voluntary conveyance. The decision in *Price* v. *Jenkins* (1) has really no bearing on the present question.

[KAY L.J. That case merely dealt with the question whether an assignment of leasehold property was a voluntary conveyance under 27 Eliz. c. 4.]

That question is an entirely different one from the present. A conveyance for the present purpose is voluntary unless a full consideration is given, and it cannot be contended that the mere liability in respect of the rent and covenants is such a consideration. It is submitted that the result of the cases is that such a gift as this made to a solicitor by his client while the relation of solicitor and client subsists, and without the client having independent professional advice, is invalid: *Huguenin* v. *Baseley* (2); *Hatch* v. *Hatch* (3); *Gibson* v. *Jeyes* (4); *Tyars* v. *Alsop* (5); *Morgan* v. *Minett*. (6) The same rule applies to a gift by the client to the solicitor's wife: *Goddard* v. *Carlisle*. (7) The plaintiff here had no independent advice, and she stated that she did not know that she was executing an irrevocable assignment of the houses. The evidence did not shew that the effect of what she was doing was fully explained to the plaintiff; and the finding of the learned judge in this respect was not justified. It was the duty of the defendant to recommend her

(1) 5 Ch. D. 619.
(2) 14 Ves. 273; 2 W. & T. L. C. 6th ed. p. 597.
(3) 9 Ves. 292.
(4) 6 Ves. 266.
(5) 61 L. T. 8.
(6) 6 Ch. D. 638.
(7) 9 Price, 169.

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to employ another solicitor. If she had had the advice of another solicitor, can it be doubted that he would have explained to her that, if she executed such a deed, it would be irrevocable? It is submitted that the effect of the authorities is that it is a hard and fast rule that such a gift cannot be valid unless the donor has independent professional advice: *Goddard* v. *Carlisle* (1); *Rhodes* v. *Bate*. (2) [He also cited *Allcard* v. *Skinner*. (3)]

Stephen Lynch, for the defendants. This gift does not come within the category of a gift made by a client to a solicitor. The cases in which a gift to a solicitor's wife by a client has been held void are cases where the Court saw that the solicitor was trying to get a benefit for himself through his wife. It is too wide a proposition to say that, because a woman happens to be the wife of a solicitor, she cannot take a gift from his client, particularly when she is the client's niece, and as such a person on whom the client might naturally be disposed to confer a benefit, apart from any influence arising from the relationship of solicitor and client. This was a gift to the female defendant for her separate use, and one from which the solicitor in point of law derived no benefit. The authorities do not shew that there is any hard and fast rule such as that contended for by the plaintiff. It is submitted that the true rule is that, if the transaction is a perfectly honest and straightforward one, it will hold good; but the onus lies on the solicitor of shewing that to be the case, and that he advised his client as fully and fairly as if he had been an independent solicitor. The learned judge's finding is to the effect that in this case that onus was sustained by the defendants. The observations of Lord Eldon in *Hatch* v. *Hatch* (4), and of Lord Brougham in *Hunter* v. *Atkins* (5), are inconsistent with the existence of such a hard and fast rule as is contended for by the plaintiff; and the judgment of Turner L.J. in *Rhodes* v. *Bate* (2) hardly shews that there is such a rule, but merely that the question whether the donor has had independent advice is a very material element in arriving at a conclusion

(1) 9 Price, 169.
(2) L. R. 1 Ch. 252.
(3) 36 Ch. D. 145.
(4) 9 Ves. 292.
(5) 3 My. & K. 113, at p. 135.

whether there was undue influence, and whether the transaction was entirely fair and straightforward.

LORD ESHER M.R. In this case the question appears to me to be whether, by virtue of a definite rule of equity, the Court is bound to set aside this conveyance which has been executed by the plaintiff. I take the facts in truth to have been, and the learned judge appears to me to have found, that the plaintiff, when she signed this deed, intended to do so with the effect of making an assignment of this property in favour of her niece, the wife of the solicitor, and that she knew that she could not afterwards alter it and intended to bind herself irrevocably by it. I think the learned judge has found, and I believe it to be the truth, that the difference between a deed which would have that effect and a will which would be revocable was fairly and fully explained by the solicitor to her before she executed the deed, so that she did precisely what she intended to do, and that no undue influence whatever was exercised over her. Although that was the case, and although she executed the deed, as I believe, not with the intention of benefiting the solicitor, whom in point of law it did not benefit, but with the exclusive intention of benefiting her niece, yet, as I understand the doctrine laid down by the Courts of Equity on the subject, there is a positive rule of equity to the effect that, because the solicitor who acted in relation to the execution of the deed was the husband of the plaintiff's niece, and the plaintiff had not the advice of an independent solicitor, therefore the gift which the plaintiff intended to make for the benefit of her niece was invalid; or in other words, according to the authorities by which the rule of equity on the subject is determined, there is in such a case a legal presumption of undue influence by the solicitor which cannot be met or rebutted by any evidence. It appears to me that that is the rule on the subject which has been laid down in the cases to which we have been referred, such as *Rhodes* v. *Bate*. (1) I must submit to that rule. I own that I think it unfortunate that such a rule should have been laid down, because in particular instances it may work great injustice; and I do not think that a hard and fast rule which may work such injustice ought to be the rule of

(1) L. R. 1 Ch. 252.

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law in the matter. But I feel bound by the authorities to hold that there is such a rule in equity. On that ground only, and believing the facts as found by the learned judge to be the truth of the matter, I think the female defendant must lose the benefit which the plaintiff, her aunt, intended to confer upon her, and this appeal must be allowed.

LOPES L.J. I have come to the same conclusion. I am sorry to differ from any view expressed by the Master of the Rolls, but I must differ from his comment on the rule of equity on this subject. I cannot consider it an unfortunate rule. It appears to me to be a hard and fast rule which is founded on public policy. In exceptional cases it may possibly work hardship; but in the generality of cases it is in my opinion highly beneficial, and I should regret to see it altered. I think the cases establish the rule that such a gift as this made by a client to his solicitor, whilst the relation of solicitor and client or any influence arising from it exists, is invalid. The relation of solicitor and client must be entirely at an end before such a gift can be validly made. I do not think that evidence of any explanation by the solicitor of the document or any assistance given by him to enable the client to understand the effect of it is of any avail to prevent the application of this general rule. What the solicitor ought in such a case to do is to suggest to the client that in order to make the gift effectual the client should procure independent professional advice. I will not refer to the authorities that have been cited at length. The judgment of Turner L.J. in *Rhodes* v. *Bate* (1) seems to me to shew that the rule on the subject is inflexible. He says: "I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." In the view I take it is unnecessary to discuss the effect of the evidence in this case. I am not prepared, however, to say that I should come to the same conclusion as the Master of the Rolls as to the

(1) L. R. 1 Ch. 252, at p. 257.

effect of it; but that is immaterial, because we are acting on the rule which I have mentioned. It appears to me clear from the cases that no distinction can be recognised between a gift made to a solicitor himself and one made to his wife. It is obvious that a solicitor might benefit largely by a gift to his wife, and there would be a similar temptation to exercise undue influence in respect of such a gift. The wife might make over the property to him the day after it had been given to her. For these reasons I think this appeal must be allowed.

Kay L.J. I must say with deference that I cannot agree with the view expressed by the Master of the Rolls with regard to the rule of equity on this matter. It appears to me to be a rule of public policy of great importance that, while a person is under the influence or presumed influence of another person in consequence of a confidential relation between them, that other person cannot accept from him a gift of any kind, unless it is shewn to have been made with competent independent advice, which I take to mean independent advice of a professional nature. The rule on the subject is laid down by Lord Erskine in *Wright* v. *Proud* (1) thus: "So, independently of all fraud, an attorney shall not take a gift from his client, while the relation subsists; though the transaction may be, not only free from fraud, but the most moral in its nature." Lord Eldon, dealing with the same subject in *Hatch* v. *Hatch* (2), says: "This case proves the wisdom of the Court in saying, it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust that a transaction shall stand purporting to be bounty for the execution of antecedent duty." It may be observed that there is a slight difference between these two statements of the rule. In the earlier case it is said that an attorney shall not take a gift from his client; whereas Lord Eldon says that it is almost impossible that the transaction shall stand. But what was said by Turner L.J. in *Rhodes* v. *Bate* (3) seems to explain this slight difference between the two statements. He there says that in the case of merely trifling gifts

(1) 13 Ves. 136.

(2) 9 Ves. 292.

(3) L. R. 1 Ch. 252.

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the Court would not interfere to set them aside upon the mere fact of a confidential relation and the absence of proof of competent and independent advice. But with regard to all other gifts he lays it down as a strict rule that "persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." I cannot conceive a wiser rule than this, or one more calculated in most cases to ensure the observance of justice and equity between parties in such a confidential relation. It applies to the case of trustee and cestui que trust, to that of guardian and ward, and pre-eminently to that of a solicitor and his client, who is necessarily so much under the influence of his solicitor. A solicitor to whom such a gift is offered ought to know the rule on the subject; and, being of necessity in a position which renders him liable to so much suspicion, he ought to inform his client that he should not make such a gift without independent advice, and that the client should not carry out the matter through him as solicitor, but should go to another solicitor. If he chooses to act himself in the matter, I think there is an imperative rule that such a gift is invalid. In this case the gift was to the solicitor's wife, and not to the solicitor himself; but the decision of the Court of Exchequer in the case of *Goddard* v. *Carlisle* (1), which has never been disputed, lays it down that there is no difference for this purpose between a gift to a man's wife and one immediately to himself, if the gift to the wife be effected by undue influence on the part of the husband. The principle is that, while the confidential relation exists, it is impossible to rebut the presumption of undue influence unless the donor had competent and independent advice. This presumption exists as much when the gift is made to the wife as when it is made to the solicitor himself.

I confess I do not take the same view of the evidence in this case as the Master of the Rolls. It appears that the plaintiff had given a previous intimation that, in consequence of work

(1) 9 Price, 169.

having been done for her gratuitously by the solicitor, she intended to leave these houses to his wife—that is to say, to leave them by a will, which is a revocable instrument. All that such a statement would amount to is that her then present intention was to make that revocable instrument in favour of the solicitor's wife. Having instructed him to make a will, she has an interview with him for the purpose of signing the will; and he then brings forward a deed, which she had given him no instructions to draw, disposing of these houses in favour of his wife. The plaintiff says that she asked why one document would not do, and that she never understood that the deed was not a revocable instrument. The solicitor himself was at the time of the trial in a state of mind that precluded him from being called as a witness; but there was the evidence of another person who was present when the deed was executed. He was not a friend of the plaintiff, but merely happened to be present. He was called for the defendants. He did not say that the plaintiff was told that the deed would be irrevocable; all he said was that the deed was explained to her. If I had been the judge, I should have come to the conclusion that she never did know the difference in this respect between a deed and a will. I do not think it is to be presumed that this old lady had that knowledge, unless the matter was explained to her. All this took place when she went to sign a will; and I do not think it was clearly shewn that she understood the effect of what she was doing. I do not, however, base my judgment on any such consideration. Assuming that she did know what she was doing, I think the rule of equity is that under the circumstances she must be presumed to have been acting under undue influence. I do not think that the learned judge below in determining this case paid sufficient regard to the rule of equity which I have mentioned, and which I must say commands my strongest respect and approval. For these reasons I think this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *J. Attenborough.*
Solicitors for defendants: *Wilson & Sons.*

E. L.

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Oct. 25.

[IN THE COURT OF APPEAL.]

SADLER *v.* GREAT WESTERN RAILWAY COMPANY.

Nuisance—Injunction—Damages—Nuisance caused by combined effect of the actions of two independent Persons—Distinct Causes of Action—Joinder of Defendants—Order XVI., *r.* 4.

The plaintiff, a dealer in cycles, brought an action against two railway companies which had parcel offices adjoining his shop on opposite sides, alleging that each company caused carts to stand on the highway in front of its office for an unreasonable length of time, and that these combined acts prevented all access to his shop by vehicle or cycle, and caused him special inconvenience and loss of trade. He claimed damages and an injunction. One of the companies obtained an order in chambers staying the action unless the claim was amended by striking out the name of the other company as a defendant:—

Held, by A. L. Smith L.J., that the order was right, for that the two companies were separate tortfeasors, and could not be joined as co-defendants in an action for damages, however the case might have stood if the action had been for an injunction only:

Held, by Rigby L.J., that, it having been decided by the Court of Appeal that where several persons concurrently do acts the doing of which by each alone would not be a nuisance, but which collectively create a nuisance to which all contribute, they may be sued together for an injunction, the present action ought to be allowed to proceed against both defendants, for that the introduction of a claim for damages, whether the plaintiff could succeed upon it or not, ought not to prevent the proceeding for an injunction, which was the principal relief sought.

Thorpe v. *Brumfitt* (L. R. 8 Ch. 650) considered.

THIS was an appeal by the plaintiff from an order of Day J. dismissing an appeal from an order of a master that the action should be stayed unless the plaintiff amended by striking out the Midland Railway Company as defendants.

The statement of claim, to which the Great Western Railway Company and the Midland Railway Company were defendants, alleged—(1.) that the plaintiff had a shop in the Strand where he carried on business connected with cycles; (2.) that the Great Western Railway Company occupied premises immediately adjoining the shop on the south side, and the Midland Railway Company occupied premises immediately adjoining the shop on the north side, and used their respective premises as railway

parcel offices; (3.) that each company caused or permitted a large number of vans and carts to assemble for long periods of time on the highway in front of its premises, with their tailboards projecting over the footway, and great quantities of parcels, crates, and boxes to be conveyed across the footway into and from such vans and carts partly by hand and partly by cranes, thereby obstructing the highway and footway, to the inconvenience and peril of the public, and that the excretions of the horses drawing the vans and carts caused an extremely offensive stench; (4.) that these acts caused special inconvenience and annoyance to the plaintiff by preventing access to his premises. (5.) "Further, each of the defendant companies frequently causes or permits access to the plaintiff's premises to be blocked by its vans and carts in manner aforesaid at the same time, while access to such premises is already blocked by vans and carts on the other side of his premises by the other defendant company in manner aforesaid, and by their respective combined acts the defendants thus prevent all access to the plaintiff's premises by vehicle or cycle, and also cause special inconvenience and peril to the plaintiff and his servants and customers on the footway." Par. 6 stated that the obstruction alleged in pars. 3, 4, and 5 constituted a nuisance to the plaintiff, who was thereby prevented from carrying on his business in an advantageous manner, and he specified several considerable losses which he had sustained in consequence. He claimed—"(1.) 1000*l.* damages. (2.) The like sum from each of the defendant companies. (3.) An injunction to restrain the defendants and each of them from continuing the acts complained of."

The Great Western Railway Company applied to strike out the Midland Railway Company as defendants. The master made the order above mentioned, which was upheld by Day J.

Dickens, Q.C., and *Chester Jones*, for the plaintiff. Each company by itself creates a nuisance; and, further, one company blocks the way when it is already blocked by the other, and this combined action constitutes a nuisance. It is not necessary to contend that the two companies are acting in concert; it is enough that their concurrent acts constitute a serious nuisance,

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where the nuisance from the acts of one alone might be trifling. *Thorpe* v. *Brumfitt* (1) shews that acts by different people, which taken separately would be too trifling to give a right of action, may together give a cause of action; and the same principle was acted upon in *Lambton* v. *Mellish*, *Lambton* v. *Cox*. (2)

[A. L. SMITH L.J. The companies are separate tortfeasors. What authority have you for suing both together?]

Order XVI., r. 4, enables them to be joined as defendants, and *Thorpe* v. *Brumfitt* (1) is an express authority in favour of so joining them. In *Hannay* v. *Smurthwaite* (3), which dealt with the case of joinder of co-plaintiffs, the joinder of co-plaintiffs with separate causes of action was held improper; and by parity of reasoning a joinder of defendants against whom the causes of action were several would be so; but in *Hannay* v. *Smurthwaite* (3) there was no connection whatever between the causes of action, each of the plaintiffs had a distinct separate demand, and the observations of Lord Herschell (4) are not against the joinder where there is such a connection as here. In *Booth* v. *Briscoe* (5) eight persons sued jointly on a libel impugning their conduct as trustees, and the action was held sustainable.

[A. L. SMITH L.J. The way in which Lord Herschell mentions *Booth* v. *Briscoe* (5) in *Smurthwaite* v. *Hannay* (6) shews that he did not approve of it.]

Lyttelton, for the Great Western Railway Company. The learned judge held that there was no authority at common law for joining in one action two tortfeasors who are not acting in concert.

[RIGBY L.J. It may not be necessary for the plaintiff to dispute that in the Common Law Courts you could not have done so; but now you have to deal with the cases in Equity, the Judicature Acts, and the General Orders.]

The plaintiff relies on Order XVI., r. 4; but *Smurthwaite* v. *Hannay* (6) decides that Order XVI., rr. 1, 4, apply only to joinder of parties, not to joinder of causes of action. The only

(1) L. R. 8 Ch. 650.
(2) [1894] 3 Ch. 163.
(3) [1893] 2 Q. B. 412; [1894] A. C. 494.
(4) [1894] A. C. 502.
(5) 2 Q. B. D. 496.
(6) [1894] A. C. 502.

case on which the appellant can rely is *Thorpe* v. *Brumfitt* (1), and it went much on the ground that the successors in title of the grantor of a right of way could not derogate from the grant. James L.J. proceeds on the ground that each of the parties was doing a wrong, not that their innocent acts together made a wrong. If the carts of the Great Western Railway Company are lawfully on the road, their being there cannot be made unlawful by the Midland Railway Company bringing carts there. *Thorpe* v. *Brumfitt* (1) was a Chancery suit for an injunction; the present is a mere common law action for damages.

[RIGBY L.J. *Thorpe* v. *Brumfitt* (1), which is binding on us, decides that an action for an injunction will lie against two independent persons whose acts collectively make a nuisance. Suppose that an action for damages will not lie, have you any authority to shew that the insertion of a claim for damages so vitiates the statement of claim that the action ought to be stayed?]

The Great Western Railway Company ought not to be embarrassed by having the action continued with a claim for damages pending.

[A. L. SMITH L.J. asked whether the plaintiff was willing to strike out the claim for damages.]

[The plaintiff declined to do so.]

Dickens, Q.C., in reply.

A. L. SMITH L.J. I am sorry to say that I cannot agree with my brother Rigby in this case.

This is an appeal from the decision of Day J. affirming an order of the master. The plaintiff brings a common law action in the Queen's Bench Division for damages against two railway companies, the Great Western Railway Company and the Midland Railway Company, for committing a nuisance, and he also adds, what is now an every-day occurrence, a claim for an injunction at the end of his statement of claim. This action is in substance a common law action for damages to be tried by a judge and jury. It is conceded by the plaintiff's counsel that the Great Western Railway Company has not acted in combination with

(1) L. R. 8 Ch. 650.

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the Midland Railway Company in doing what it has done, and also that the Midland Railway Company has not acted in combination with the Great Western Railway Company in doing what the Midland Railway Company has done. What is complained of is this. The plaintiff has a shop in the Strand, on one side of which the Great Western Railway Company has a receiving office for parcels and goods, and on the other side the Midland Railway Company has a similar receiving office. They are two separate and independent companies carrying on separate and independent businesses, each bringing its own vans opposite its own premises for the purposes of its own business. One has no control over the other, and each acts independently in what it does. It seems to me that each is only responsible for its own acts, and is not responsible for the acts of the other. I agree with this, that in considering whether the Great Western Railway Company has committed a nuisance or not (assuming the Midland Railway Company to be struck out) the doings of the Midland Railway Company would have to be taken into consideration. And vice versâ, if the action had been against the Midland Railway Company alone, the doings of the Great Western Railway Company would have to be taken into account in considering whether the Midland Railway Company was committing a nuisance in what it did. But that is not what the plaintiff is trying to do here. He is trying to sue as co-defendants two independent separate alleged tortfeasors, neither of whom has any control or power over the acts of the other tortfeasor. He is trying to sue them jointly in one action. Can he do that? A summons was taken out to stay this action upon the facts which I have stated unless the Midland Railway Company was struck out. That procedure was the same as that adopted in *Smurthwaite* v. *Hannay* (1), these two defendants being joined, as I understand, under Order XVI., r. 4, and the ground of the application to strike out one is, that Order XVI., r. 4, gives no power under the circumstances of the case to join the two as co-defendants. My brother Day came to that conclusion, and so did the master, and so do I.

It seems to me that these two companies, who, if they are liable for anything at all, are independent tortfeasors, cannot be

(1) [1894] A. C. 494.

joined by the plaintiff in one action as co-defendants. As I read *Smurthwaite* v. *Hannay* (1), the question of the joinder of two plaintiffs equally applies to joinder of two defendants. That decision, so far as it is applicable to the present case, is against the joinder of the two companies; for I agree with Mr. Lyttelton that the House of Lords decided that Order XVI., rr. 1 and 4, have relation only to the joinder of parties, and not to the joinder of causes of action.

I think that the ground of the difference between my brother Rigby and myself in this case is that he thinks that there is a joint cause of action against the two companies. With submission, I do not think that there is, for in my opinion these two torts, if they are torts, are independent torts by the different companies, although, as I have already stated, the acts of each company can be taken into account in considering the acts of one company and deciding whether they amount to a nuisance or not. The acts of the other company must be taken into account, because it may be that the one company ought not to be doing what it was when the other company was doing what it did. But that does not make these two causes of action a joint cause of action, or give any right to join one company with the other in one action. It is said that I am not following loyally the passage in the judgment of James L.J. in the case of *Thorpe* v. *Brumfitt*. (2) In that case the Lord Justice was not dealing with an action at law for damages, but he was dealing with the question of restraining a nuisance; and if the plaintiff's counsel in this action had accepted that position, namely, that he would strike out all question of damages and simply go for the injunction, it may be that I should have felt myself bound by what the Lord Justice had said; but, inasmuch as the plaintiff adheres in this case to what I say is a common law action for damages with the claim for an injunction thrown in, I think that Day J. properly exercised the jurisdiction he had by making the order which he did make, and I think that it ought to be upheld.

I would point out that in the case of *Lambton* v. *Mellish* (3),

(1) [1894] A. C. 494. (2) L. R. 8 Ch. 650.
(3) [1894] 3 Ch. 163.

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before Chitty J., the correct course was adopted, namely, a separate action against each independent tortfeasor.

RIGBY L.J. I regret that I cannot see this case in the same point of view as my brother Lord Justice. The question turns upon the 5th clause of the statement of claim, in which it is alleged that "each of the defendant companies frequently causes or permits access to the plaintiff's premises to be blocked by its vans and carts in the manner aforesaid at the same time while access to such premises is already blocked by vans and carts on the other side of his premises by the other defendant company in manner aforesaid, and by their respective combined acts" (I do not rely upon the word "combined," because it was fairly explained as meaning nothing more than concurrent), "the defendants thus prevent all access to the plaintiff's premises by vehicle or cycle." That is a substantive ground of complaint if it is made out; and it appears to me that if it is made out there is a nuisance—not two nuisances, but one, a nuisance to which each of the defendants contributes, and contributes not in such an uncertain degree that the plaintiff does not know how, but he says that each of the companies frequently stops access on one side while access is stopped on the other side by the other company, so that altogether any access of a wheeled vehicle to his premises is totally prevented. I conceive that this is a case in which an action can be brought against the companies jointly.

It is said that this is a common law action. I confess that I do not know what a common law action is at the present day. This is an action brought in the Queen's Bench Division in respect to a matter over which the ancient Common Law Courts had jurisdiction—so much so, that in Chancery in the olden days, if the plaintiff's right at law was in dispute, the question of injunction never could be raised until the right at law had been settled; and in those days, if the case of *Thorpe* v. *Brumfitt* (1) had arisen, it would have been sent back to a Common Law Court to find out whether there was a nuisance. That has been modified in later times; but that was the original idea. The plaintiff rested upon a legal right. James and Mellish L.JJ. in

(1) L. R. 8 Ch. 650.

that case decided that the acts of a plurality of people might, when concurrently done, create a nuisance, where the act of each one of those individuals taken alone would be no nuisance at all, but a mere ordinary exercise of his own right. That is recognised by Chitty J. in *Lambton* v. *Mellish* (1), though that case had nothing directly to do with the question of parties, as there were there two actions. Now, if the Court of Appeal were right—and I think that we are bound to assume that they were right—in *Thorpe* v. *Brumfitt* (2), it appears to me that according to law, as well as in accordance with what is convenient, two or three people, though they do not combine in the sense of planning any scheme of action, may in fact act in such a manner as to make themselves liable to be sued for a nuisance, and (whether they were jointly liable at common law or not) liable to be sued in a joint action under the effect of the Judicature Acts and Order XVI., r. 4. Suppose there be a carriage-road which I have a right to use, and there are two other people who have a similar right to use it. If the carriage of one of them stood on the road, it would not interfere with my user of the road; but if the carriages of both stood side by side on the road, not by any arrangement between them, but by reason of a dispute between themselves, and so stopped my way, I conceive that they would be doing an injury to my right of way, and might be sued, I should have supposed, at common law. But at all events, that being the state of things, and an action being brought for an injunction, what right has one defendant to say, "I will not be restrained unless my co-defendant is removed from the action"? I know of no such right. It appears to me singularly inconvenient that such a doctrine should be laid down; and I think we ought not to act in accordance with it unless we are absolutely forced to do so by some decision binding upon us, and no such decision has been brought before us.

If it is said that damages being asked for is a reason why the action should be stayed, I again want authority for that. I do not remember having heard of any such authority, and none has been cited before us. The main relief sought in this action is

(1) [1894] 3 Ch. 163. (2) L. R. 8 Ch. 650.

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Rigby L.J.

the injunction to do away with a state of things which, if the statement of claim be correct, must be doing continual and grave injury to the business of the plaintiff. I look upon the injunction as the main relief, not as an incident. It is not as an incident that an injunction is granted. It is granted according to the rules which used to govern the Court of Chancery. If, indeed, there be a difficulty about assessing damages against these defendants separately, or if it be impossible to do so, that is all the worse for the plaintiff. He may fail in establishing his claim to damages, but I do not see how any objection can be taken to his injunction; and the injunction, as I said before, is a main part of the relief that he asks for. As to *Smurthwaite* v. *Hannay* (1), the effect of that decision, as I understand it, is shortly this, that you cannot bring plaintiffs—and by parity of reasoning you cannot bring defendants—before the Court, where the causes of action vested in the different plaintiffs or the causes of action that exist against the different defendants are separate. I do not look upon this case as one where the liability of the defendants is separate. No doubt the plaintiff in his statement of claim alleges a separate case against each of the defendants; but in clause 5 he alleges what may be a much more formidable case—that the concurrent action of the two defendants creates a nuisance. If, therefore, my judgment had to decide this matter, I should differ from the learned judge; but of course, as my learned brother does not take the same view, the decision stands.

A. L. SMITH L.J. There will be no costs of this appeal.

Appeal dismissed.

Solicitors: *Kennedy, Hughes & Kennedy; R. Nelson.*

(1) [1894] A. C. 494.

H. C. J.

[IN THE COURT OF APPEAL.]

C. A.
1895
Nov. 13.

STRACHAN *v.* THE UNIVERSAL STOCK EXCHANGE, LIMITED (No. 2).

Stock Exchange—Gaming and Wagering Contract—Payment of Differences—Money deposited as Cover—Action to recover back Money—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

By the Gaming Act, 1845, it is enacted that "No suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing . . . . which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

In an action to recover back money deposited as cover for differences which might arise on gambling transactions in stocks and shares, it appeared that the money was treated by the defendants, to the knowledge of the plaintiff, as appropriated to meet his losses to the defendants, and that the whole amount had been so appropriated before the plaintiff gave notice to terminate the gambling transaction :—

Held, that the plaintiff could not recover.

The statute applies equally to money or valuable things deposited with the other party to the bet as to those deposited with a stakeholder.

Appeal of the plaintiff from so much of the judgment in the action as directed judgment to be entered for the defendants in respect of a sum of 3000*l.*

The action was brought to recover back this sum of money and certain shares deposited by the plaintiff with the defendants, who were not members of the Stock Exchange, but carried on the business of stock and share jobbers or dealers. The money and shares were deposited by way of cover or security for the payment of differences on the transactions between the plaintiff and the defendants which purported to be dealings in stocks, shares, and securities. The action was tried before Cave J. and a special jury, who, in answer to a question left by the learned judge, found that the whole of the transactions between the parties were gambling transactions. The learned judge thereupon entered judgment for the plaintiff in respect of the deposited shares for a return of those securities or their value; but he entered judgment for the defendants in respect of the

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money deposited. The defendants appealed as to these securities; and the Court of Appeal, in the case of *Strachan* v. *Universal Stock Exchange* (1), affirmed the judgment of the learned judge on this matter. The plaintiff subsequently brought this appeal in respect of the money deposited, and claimed to be entitled to recover it back. Evidence was given at the trial as to the mode in which the money deposited had been dealt with by the defendants; and the learned judge was of opinion that before the action was brought the whole amount had been appropriated by the defendants to meet the indebtedness of the plaintiff arising on the accounts between them; and that consequently the plaintiff was not in a position to recover back the deposit.

1895. Aug. 6. *Bigham, Q.C.*, and *Muir Mackenzie*, for the plaintiff, in support of the appeal. The decision in *Strachan* v. *Universal Stock Exchange* (1) covers the present application. It is not material whether the securities deposited are bonds, or bank-notes, or cash. If the person who deposits them is in time, he may repudiate the bet and recover back the deposit; and the evidence in this case shews that the intention was to treat the 3000*l.* as a continuing deposit, to be held in suspense till the account was closed, and that the defendants did not attempt to pay themselves out of it until after action.

Lawson Walton, Q.C., and *Pollard*, for the defendants, contended that the former judgment of this Court did not apply to the money, which was deposited to abide the event of the wagers, and could not be recovered. Further, the evidence shewed that it had been carried into account to meet the plaintiff's indebtedness to the defendants, and that accounts which shewed this had been furnished to him. [They cited *Manning* v. *Purcell* (2); *Martin* v. *Hewson* (3); *Gatty* v. *Field*. (4)]

Bigham, Q.C., in reply.

Cur. adv. vult.

1895. Nov. 13. LORD ESHER M.R. In this case the plaintiff is an officer on half-pay, and he had been betting with his broker, who trades as a limited company, to the extent in a

(1) Ante, p. 329.
(2) 7 D. M. & G. 55.
(3) 10 Ex. 737.
(4) 9 Q. B. 431.

few months of something like three millions. The broker required the plaintiff to give security; and he accordingly handed over certain shares, together with a deposit of 3000*l.* in money. The bets, which were in respect of differences, came off in favour of the broker, who assumed to pay himself with the deposit and retain the securities. An action was brought by the plaintiff to recover back both the securities and the deposit; and Cave J., before whom the case was tried, decided that he was entitled to recover back the former, but not the latter. On an appeal by the defendant this Court held that the learned judge had rightly decided as to the securities. The question on the present appeal is whether the plaintiff is entitled to recover back the money deposited. The delay in giving judgment is mainly due to my being very unwilling to say that the plaintiff should not recover back the deposit. That unwillingness arose from this reason, because to hold that the money could not be recovered back would be to say that a broker who understands this business and persuades a person who deals with him to give a deposit can get that deposit completely in his power. I think, however, that I am bound to hold that when, under such circumstances, a person is so foolish as to give a deposit he can never recover it back, and even if he has won the wager the person who has the deposit can refuse to pay it back. I think that is the effect of the Act, and that our decision must go to that length. It is quite true that it has been held that before the wager is decided it can be repudiated, and a deposit can be recovered back. These decisions seem to me to be an encroachment on the plain words of the Act; but they are agreeable to my mind, and I do not attempt to question them. But when we are invited to go further, and say that after the wager is determined the person who has deposited money can still recover it back from the person with whom the bet is made (I am not now speaking of stakeholders), I cannot see that we ought to go that length on the true construction of the Act. I will not say anything against the encroachments on the Act that have been made, but I think we cannot carry them further. The true meaning of the Act is that such a deposit as this, when the wager has come off and whether it is lost or won, cannot be

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recovered back if the person with whom the deposit was made resists giving it back. I am fortified in this view by the judgment of Turner L.J. in *Manning* v. *Purcell* (1), where he says that payments in respect of bets and deposits upon bets decided in the testator's lifetime could not, having regard to the provisions of the statute, have been recovered from the testator in his lifetime. I think those provisions are absolute upon the point; and on that ground, although the result that a man who gets a deposit and loses the bet can nevertheless keep the deposit is, to my mind, to be regretted, I think the decision of Cave J. must be affirmed.

KAY L.J. read the following judgment:—The plaintiff and the defendants in September, 1893, entered into a contract for gambling in stocks and shares by pretending to buy for a future day, and debiting or crediting one another for any change in the market price on the day named, without, in fact, buying or selling any stocks or shares.

The plaintiff deposited with the defendants, who are brokers, certain property as security for the performance of this contract. These securities were not realized, and he has been held entitled to recover them. But he also deposited with the defendants 3000*l.* in money, in two different sums of 2000*l.* and 1000*l.*—the former sum on February 10, 1894, the latter on the 27th of the same month. The receipts for these sums shew that they were deposited as what is called cover—that is, to abide the results of the gambling—and if the result was in favour of the brokers, to enable them to pay themselves by appropriating the deposit, or so much of it as was necessary.

Accounts were furnished by the brokers every three months, and in the first, rendered after these deposits were made, they were entered to the brokers' debit on the days of receipt, the balance being 2413*l.* 16*s.* 11*d.* in favour of the plaintiff. Thus 536*l.* 3*s.* 1*d.* of the 3000*l.* was shewn to have been used; and the account shewed that, to make up the required cover of 3000*l.* for future transactions, 586*l.* 3*s.* 1*d.* must be paid to the brokers, and on the assumption that this would be done there was an entry,

(1) 7 D. M. & G. 55, at p. 66.

"Deposit retained, 3000*l.*" Interest was credited to the plaintiff upon the 3000*l.* on one side of the account, and on the other he was debited with interest on the pretended purchases. The plaintiff paid 586*l.* 3*s.* 1*d.* on March 8; and the 3000*l.* having been thus made good, the gambling went on until April 25, when the plaintiff gave notice to the defendants to close the account. On April 26 the plaintiff commenced this action to recover the 3000*l.*

It appears from the account since rendered, which has been put in by the plaintiff, that at that date he was indebted to the defendants to an amount much exceeding the 3000*l.*, the account being stated precisely in the same way as the former account which he had received, and the 3000*l.* being entered in two sums of "balance 2413*l.* 16*s.* 11*d.* and cash 586*l.* 3*s.* 1*d.*" as the first items to the plaintiff's credit.

Attention was particularly called to the fact that interest on 3000*l.* was credited to the plaintiff up to June 22, the day of delivering this last account, and this, it was said, shewed that the 3000*l.* had not been appropriated.

Before the commencement of this action there was no repudiation by the plaintiff of the gambling transaction.

By s. 18 of 8 & 9 Vict. c. 109, the contract between the plaintiff and defendants for gambling was "null and void." By the latter part of the same section it is provided that "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

If this deposit comes within those words it cannot be recovered. It is suggested that the statute only refers to money or valuables deposited with a third person as stakeholder. The statute does not say so—it says with "any person"; and I am not able to conceive any valid reason for construing it to have the suggested meaning. The object is to discourage gaming and wagering, by making the money won or lost irrecoverable, and also by making any deposit made to abide the event irrecoverable. What can it matter with whom it was deposited? If this

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could be recovered, the intention as well as the letter of the statute would be violated. It was quite familiar that money was deposited with one of the gamblers, as well as with a third party as stakeholder. For example, it was common in betting with a bookmaker to deposit the amount which he might win on cash bets in his hands—to be his in case he won, if not to be returned when he paid his loss.

This very thing occurred in *Manning* v. *Purcell*. (1) The testator in that case kept a betting-office, and betted on horse races, and received deposits from the persons who betted with him. Some of these bets were determined against him in his lifetime—some after his death. His widow and administratrix paid those bets decided in the testator's lifetime, and returned the deposits as to them. She also returned the deposits as to those bets which were decided after the testator's death. With respect to the latter, it was held that she was right to return the deposits, because the bets undecided were cancelled by the testator's death; but as to those decided in his lifetime she was not allowed to retain the amount out of the estate on the ground that 8 & 9 Vict. c. 109, s. 18, made both the bets and deposits irrecoverable. Turner L.J. said that as to these payments "having regard to the provisions of the statute, they could not have been recovered from the testator in his lifetime, and that, therefore, the payments by the administratrix in respect of these can be regarded only as voluntary payments, and not valid as against the estate." I should consider this decision binding on me if I disagreed with it. But, for the reasons already indicated, I respectfully say I entirely agree with it.

Then it was argued that at any time before the money was appropriated by the defendants the plaintiff could repudiate the void contract and reclaim the deposit. This was decided in *Varney* v. *Hickman* (2) and *Hampden* v. *Walsh* (3), and (in the Privy Council) *Trimble* v. *Hill*. (4) One of the grounds in the first of these cases, and I confess the most intelligible to me, is that, upon the repudiation, the money ceased to abide the event, and became money of the plaintiffs in the hands of the defend-

(1) 7 D. M. & G. 55.
(2) 5 C. B. 271.
(3) 1 Q. B. D. 189.
(4) 5 App. Cas. 342.

ants, without any good reason for detaining it. In *Gatty* v. *Field* (1) it was held that the repudiation must be made before action brought, and, as there is no cause of action until repudiation, this is not a merely technical objection.

But there is a question whether the plaintiff in this case could, at the time of bringing the action, have repudiated, so as to entitle him to a return of the deposit; and upon the facts which I have stated I do not think that he could. He did not bring this action until the 3000*l.* was more than absorbed by his losses, and he knew, from the manner in which the accounts sent to him were stated, that the 3000*l.* would be treated as appropriated toward those losses. It was sought to avoid this difficulty by saying that in the account rendered after action the plaintiff was credited with interest on the 3000*l.* down to the date of sending in that account, although it shewed a large balance against him. But as this 3000*l.* was entered as the first item of the plaintiff's credit, this credit of interest must be treated as a mistake if it really credited interest beyond April 25, when the account was closed.

For these reasons I think the appeal fails.

A. L. SMITH L.J. read the following judgment:—The plaintiff, who is a retired officer upon half-pay, had transactions with the defendant, who trades under the name and style of the Universal Stock Exchange, Limited, in shares, amounting upon paper to over three millions of money in about six months. It was part of the agreement between them that the plaintiff should deposit with the defendant 3000*l.* in money, as also certain other securities with which we are not now concerned.

The action came to trial before my brother Cave, when a special jury found that the bargains which the plaintiff was seeking to repudiate were bargains by way of gaming and wagering—in other words, that the plaintiff and defendant were bettors inter se and in pari delicto. The learned judge thereupon gave judgment for the return of the securities deposited by the plaintiff with the defendant, which then still remained in his possession unappropriated by him, but refused to order the return

(1) 9 Q. B. 431.

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of the 3000*l.*, being of opinion that the evidence shewed that, before the plaintiff had sought to put an end to the wagering and gaming which was being carried on between him and the defendant, the money had, according to the agreement which had existed, been exhausted by the losses sustained by the plaintiff.

The defendant appealed to this Court against the judgment of Cave J. ordering the return of the securities, and we dismissed the appeal. The plaintiff, though he gave no notice by way of cross-appeal, now appeals against that part of the judgment of Cave J. which refused to give judgment for the repayment to him of the 3000*l.*, and the question is whether this refusal was correct.

There was good evidence from which the jury might find, as they did, that the transactions which took place between the plaintiff and the defendant were, by agreement between them, gaming and wagering transactions, they being of opinion that neither party was in reality under liability to take up a single share, the differences in the prices of named shares, as they from time to time appeared in the list of quotations, being the standard upon which the parties were to game and wager, and which differences were alone to be accounted for by the one to the other.

The object with which the 3000*l.* was deposited by the plaintiff with the defendant was, that the defendant might be certain, without having to look to either the solvency or honour of the plaintiff, of being able to obtain payment of any money which, upon the wagering transactions, might appear to his credit against the plaintiff.

The statute 8 & 9 Vict. c. 109, s. 18, enacts that all contracts by way of gaming and wagering shall be null and void; and it also enacts that no suit shall be brought or maintained to recover any sum of money alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager should have been made.

It will be seen that this section does not make the agreement illegal, but renders it void; and, as was well pointed out by

Lush J. in *Haigh* v. *Town Council of Sheffield* (1), a wager by the statute is made a thing of neutral character—it is not forbidden. The statute leaves an ordinary betting debt a mere debt of honour, depriving it of all legal obligation, but not making it illegal.

It is manifest that no action can be brought by the one against the other to enforce any contract so declared to be void; but it has been held by authorities, which it is far too late now to question, that, as soon as one party to a gaming contract receives notice from the other party that the former declines to abide any longer by the wagering contract, money deposited by him thereupon ceases to be money deposited in the hands of the latter "to abide the event on which any wager shall have been made"; and any money still in the latter's hands unappropriated by him becomes money of the former, without any good reason for the latter detaining it; and in such circumstances an action for money had and received to the plaintiff's use will lie.

This was held as long ago as the year 1828 by the King's Bench in *Hastelow* v. *Jackson* (2); again, in 1847, by the Common Pleas in *Varney* v. *Hickman* (3), followed by *Hampden* v. *Walsh* (4) in 1876, and adopted in 1880 by the Privy Council in *Trimble* v. *Hill*. (5) This principle was also, as it appears to me, enunciated by Turner and Knight Bruce L.JJ. in the case of *Manning* v. *Purcell*. (6)

This notice may be given before as well as after the event, to abide which the money has been deposited, has come off; but in the latter case it must be given before the money has been appropriated to the purpose for which it had been deposited, for if appropriated it is no longer money of the plaintiff in the defendant's hands. If it is still unappropriated, the defendant cannot set up the gaming and wagering contract to retain it, for the statute enacts that such a contract is void. The result, therefore, is that if one party to a gaming and wagering contract gives to the other party notice in time that he withdraws from

(1) L. R. 10 Q. B. 102.
(2) 8 B. & C. 221.
(3) 5 C. B. 271.
(4) 1 Q. B. D. 189.
(5) 5 App. Cas. 342.
(6) 7 D. M. & G. 55.

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the contract, he can recover back his deposit, whether in the hands of his co-bettor or of a third party—aliter if he does not.

In the present case, when the plaintiff gave the notice to the defendant that he withdrew from any further carrying on of the gaming and put an end to the contract, which he was entitled to do, it is admitted that he was largely indebted to the defendant for differences; and in my judgment my brother Cave took the correct view (notwithstanding criticisms that have been made upon the form of the accounts) of the transactions between the parties, when he held that as the plaintiff became from time to time in debt to the defendant for differences the 3000*l.* pro tanto became used up, and that as a matter of fact every farthing of the 3000*l.* had been exhausted, and more, when the notice was given by the plaintiff, and that, this being the real truth of the case, the plaintiff could not recover back the 3000*l.* nor any part of it.

Cave J. was right in refusing to order the return to the plaintiff of the 3000*l.* In the case of the securities deposited, the plaintiff was in time with his notice, and in this he was not. The appeal must share the same fate as that of the defendants' appeal, and be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *Theodore Allingham.*
Solicitors for defendants: *Last & Sons.*

A. M.

[IN THE COURT OF APPEAL.]

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Nov. 18, 19.

CLUTTON & CO. *v.* ATTENBOROUGH.

Cheque—Negotiable Instrument—"Fictitious or Non-existing Person"—Ignorance of Drawer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3; *s.* 73.

A clerk employed in the account department of the plaintiffs' business, by fraudulently representing to them that work had been done on their account by B., induced them from time to time to draw cheques payable to the order of B. in payment for the pretended work. There was in fact no such person as B. The cheques when signed by the plaintiffs were sent by them to the account department for postage to the supposed payee. The clerk, having obtained possession of the cheques, forged the indorsement of B. to them, and negotiated them with the defendant, who gave value for them in good faith. The cheques were duly honoured by the plaintiffs' bankers. The plaintiffs, having subsequently discovered the fraud, sought to recover from the defendant the amount of the cheques as money paid under a mistake of fact:—

Held (affirming the judgment of Wills J.), that B. was not the less a "fictitious or non-existing person" within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, because, at the time of drawing the cheques, the plaintiffs supposed him to be a real person; and, consequently, that the defendant, as a holder in due course of the cheques, which must be treated as payable to bearer, was entitled to the amounts which he had received, and the action could not be maintained.

APPEAL from the judgment of Wills J. in favour of the defendant.

The facts as found by the learned judge are fully stated in the report of the case in the Court below. (1)

E. Tindal Atkinson, Q.C., and *Meek*, for the plaintiffs. The supposed cheques were not in truth cheques, because no one was really designated as payee by the drawer. They were drawn payable to order, but there was no one who could indorse; and they were not payable to bearer by virtue of sub-s. 3 of s. 7 of the Bills of Exchange Act, 1882 (2), because that section only

(1) Ante, p. 306.

(2) By s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." By s. 73, "A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

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applies where the payee is "a fictitious or non-existing person" to the knowledge of the drawer. Therefore the defendant could make no title to the cheques. The case of *Bank of England* v. *Vagliano Brothers* (1) does not govern this case, as the learned judge below supposed. There the question was whether the bank was entitled to debit its customer, the acceptor, with the amount of the bills which the bank had paid, and the case was decided mainly on the ground that the customer was estopped by his conduct from disputing that the instruments were proper bills of exchange. All that was really decided by the learned Lords who dealt with s. 7, sub-s. 3, was that, if the drawer knows the payee to be fictitious or non-existing, it is immaterial for the purposes of the sub-section that the acceptor does not know that to be so. The word "fictitious" in the sub-section implies an act of the mind of the person who draws the instrument, and who designates the payee. If he chooses to put in circulation that which is apparently a negotiable instrument, but which he knows to be drawn payable to a fictitious payee, it is reasonable that it should, when issued, be treated as payable to bearer. The object of the enactment was that, where the drawer of a bill or cheque by his own act creates this difficulty, he shall not be able to take advantage of it, but the instrument shall be payable to bearer. In this case the drawer intended to draw cheques only payable to the order of a real person; and the defendant took the cheques as payable to such an order, and not as payable to bearer. The reasoning of Lord Herschell in *Bank of England* v. *Vagliano Brothers* (2) really was to the effect that the fictitiousness of the payee must be determined in relation to the drawer, and not the acceptor of a bill. The considerations which apply to a drawer were not gone into in that case. The plaintiffs never issued these cheques or put them into circulation as negotiable instruments—certainly not as payable to bearer. They were handed to a clerk for a special purpose, namely, to transmit to the supposed payee; and while they were in the plaintiffs' servant's hands they were in the plaintiffs' hands, and were revocable. It was as if they had been placed in a drawer and stolen from thence. In that case negligence in

(1) [1891] A. C. 107. (2) [1891] A. C. 107, at pp. 147–49.

the custody of the cheques would not render the plaintiffs liable on them: *Arnold* v. *Cheque Bank*. (1) These cheques were never negotiated. There was no "delivery" of the cheques to any holder within the meaning of s. 31 of the Bills of Exchange Act, 1882.

[LORD ESHER M.R. referred to s. 21, sub-s. 2, of the Act.]

These cheques were not issued by the plaintiffs to be given to any one as cheques payable to bearer.

Sir E. Clarke, *Q.C.*, and *Macaskie*, for the defendant, were not called upon.

LORD ESHER M.R. In this case the plaintiffs signed these cheques, being no doubt induced to do so by the fraud of one of their clerks. When they were signed, they were not put into a drawer, as suggested by the plaintiffs' counsel, but were given out by the plaintiffs to their clerk in order that they might be paid over as cheques to some one else. They came into the hands of the defendant, who took them for value and in good faith. I have no doubt that, if a person so signs a bill or cheque and issues it as a negotiable instrument, he is liable upon it to a bonâ fide holder for value. In the case of a cheque it is clear that, when it is presented to the banker for payment, and he looks at the signature and sees that it is the signature of his customer, he at all events has no need to look any further. The plaintiffs' counsel contended that these were not cheques. I cannot agree with that contention. They were signed by the drawers as cheques, and given out by them to be used as cheques; and in the hands of an innocent holder for value I think they were cheques. The same principle applies where a person signs his name as acceptor of a bill of exchange, and an innocent holder for value takes it on the faith of that signature. That is the effect of what the House of Lords said in the case of *Bank of England* v. *Vagliano Brothers*. (2) The broad principle in my opinion is that a person who draws or accepts a negotiable instrument, whether a bill of exchange or a cheque, and issues it to be used as such, is liable upon it to a person into whose hands it comes bonâ fide and for value. The law on the subject

(1) 1 C. P. D. 578. (2) [1891] A. C. 107.

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must now be sought for in the code contained in the Bills of Exchange Act, 1882. The provision of the Act relating to the point taken in this case is stated by Lord Herschell and the other learned Lords who decided the case of *Bank of England* v. *Vagliano Brothers* (1) to be perfectly plain. It appears to me that the present case comes exactly within the words of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, as interpreted by the House of Lords in that case. That being so, I think the appeal must be dismissed.

LOPES L.J. I agree. The case of *Bank of England* v. *Vagliano Brothers* (1) appears to me to be conclusive of the present case. This case comes in my opinion within sub-s. 3 of s. 7 of the Bills of Exchange Act, 1882. The counsel for the plaintiffs in their ingenious argument endeavoured to import into that enactment a qualification, namely, that the payee of the bill or cheque must be a fictitious or non-existing person to the knowledge of the drawer. This contention appears to me to be entirely contrary to the effect of the decision in *Bank of England* v. *Vagliano Brothers.* (1) It was sought to draw a distinction for this purpose between the drawer of a cheque and the acceptor of a bill of exchange. I can see no distinction between them with regard to the application of the sub-section. I will not attempt to give a definition of "fictitious" or "non-existing," as I think the meaning of these expressions has been sufficiently explained in *Bank of England* v. *Vagliano Brothers.* (1)

KAY L.J. In my opinion the point now raised is really decided by the case of *Bank of England* v. *Vagliano Brothers.* (1) I understand the facts to be in substance these. A clerk of the plaintiffs caused certain cheques to be laid before one of the plaintiffs' firm, who signed them, and then gave them out for the purpose of being issued and used as cheques. He understood that this was what was to be done with them by the clerk to whom they were handed. The cheques were drawn to the order of "George Brett," who was a fictitious person in the sense that no individual was intended by that name. There may be many

(1) [1891] A. C. 107.

persons of that name in the world, but none of such persons was intended. The plaintiffs' clerk forged indorsements upon the cheques, and took them to the defendant, who gave value for them, being perfectly innocent, and unaware of the forgery or any other irregularity with regard to the cheques. The defendant presented them for payment and received the amounts of them from the bankers upon whom they were drawn. The plaintiffs now seek to recover from the defendant the amounts so received by him. The first question is, what were these cheques? Sect. 7, sub-s. 3, of the Bills of Exchange Act, 1882, provides that, "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." The payee in this case was in my opinion such a person, and therefore the cheques were payable to bearer. It was argued that this was not so, unless the drawer knew when he signed them that "George Brett" was a fictitious person. That seems to me to be the very point that was decided in *Bank of England* v. *Vagliano Brothers*. (1) In that case the majority of the learned Lords said distinctly that the sub-section does not impose the condition that the payee must be fictitious to the knowledge of any person, but is a positive enactment that, where the payee is in fact a fictitious person, the bill shall be payable to bearer; and that to impose such a condition would be to add words to the sub-section. Lord Herschell said in that case: "Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. 'Where the payee is a fictitious or non-existent person' means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee. I can find no warrant in the statute itself for inserting any limitation or condition." Again he said: "It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer, 'fictitious' must mean fictitious as regards the acceptor, and to his knowledge. With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the words fictitious 'as regards' the acceptor. I have a difficulty in

(1) [1891] A. C. 107.

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seeing how a payee, who is in fact a 'fictitious' person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world—how such a payee can be 'fictitious' as regards one person and not another. The truth is the words 'as regards' the acceptor are treated as equivalent to the words 'to the knowledge of' the acceptor. But I do not think these expressions are synonymous." Then further on he said that he felt himself compelled to the conclusion "that in order to establish the right to treat a bill as payable to bearer, it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary if it be sought to charge the acceptor to prove in addition that he was cognisant of the fictitious character of the payee." That is the law as to the acceptor of a a bill of exchange. Now a cheque is an inland bill of exchange, though it differs from other bills of exchange because there is no acceptance of it and the drawer is therefore the person primarily liable upon it. Although the drawer is not in terms an "acceptor," yet he is substantially in the same position as an acceptor of a bill, and every word of the judgment in *Bank of England* v. *Vagliano Brothers* (1) which I have read applies as closely to his position as to that of the acceptor of a bill. If it is sufficient, in the case of such an acceptor, that the bill should be in fact drawn payable to a fictitious person, and the question whether the acceptor knew that to be so is immaterial, it seems to me that in the case of a cheque the knowledge of the drawer is equally immaterial.

Then it was said that these cheques were never issued. Upon the facts as I understand them I cannot agree with that contention. The drawer signed them intending them to be cheques, and handed them over to a clerk intending them to be issued as cheques. To allow the plaintiffs after that to say as against an innocent holder for value that they were never issued appears to me to be impossible. The defendant seems to me to be entitled to say that these cheques must be treated as payable to bearer and therefore indorsement was unnecessary, and that he took them for value and in good faith, and therefore he had

(1) [1891] A. C. 107.

a right to be paid the amount of them. I do not see any answer to that contention; and I therefore think that this appeal fails.

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Appeal dismissed.

Solicitor for plaintiffs: *H. S. Clutton.*

Solicitors for defendant: *Stanley Attenborough & Tyer.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1895 *Nov.* 19.

HILL *v.* SCOTT.

Carrier—Goods—Carriage by Sea—Goods shipped without Bill of Lading—Liability of Shipowner.

The plaintiff, a wool merchant at Bradford, bought wool in London and handed a delivery order to the defendant, who shipped the wool on board his steamer in London, carried it by sea to Goole, and forwarded it by rail to Bradford, charging the plaintiff a through rate of 1*l.* 7*s.* 6*d.* per ton, which covered all expenses of the transit from London to Bradford, including insurance. The insurance was effected by the defendant, who selected the underwriters and paid the premium, after receiving directions from the plaintiff as to the amount per bale for which he was to insure. The plaintiff did not receive possession of the policy; and on previous occasions, when losses had occurred, the defendant had received payment from the underwriters, and had settled with the plaintiff. The wool was shipped without a bill of lading. In cases where the plaintiff imported wool from Australia, he insured it for the whole transit, and the defendant charged only 1*l.* 5*s.* 9*d.* per ton for its conveyance from London to Bradford.

In an action to recover damages for injury by sea-water to the plaintiff's wool, bought in London and shipped by the defendant's steamer:—

Held, affirming the judgment of Lord Russell C.J., that the defendant had insured the wool, not as agent for the plaintiff, but to cover his own liability as carrier, and had undertaken a liability equal to that of a common carrier, and had not, either expressly or impliedly, stipulated for any limitation of his liability, and therefore was liable without proof of negligence.

APPEAL from a judgment of Lord Russell of Killowen C.J., reported ante, p. 371, where the facts are fully set out.

Joseph Walton, Q.C., and *Hollams*, for the defendant.

English Harrison (*Channell, Q.C.*, with him), for the plaintiff, was not called on.

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LORD ESHER M.R. In this case there are no pleadings; but under the direction of the Court the parties stated what case they wished to have tried. The effect of the defence raised by the defendant's solicitors is this—that it was agreed that the defendant, as agent for the plaintiff, should take out policies of insurance on the wool, and that the proper inference to be drawn from this, and from the course of business between the parties, is that the defendant was not to be liable for any loss covered by the policy of insurance. The Lord Chief Justice held that the insurance was made by the defendant on his own behalf; and, having looked at the reasons given for this conclusion, I agree entirely with them, and with the conclusion that no inference can be drawn of any stipulation to limit the defendant's liability. I also agree with the conclusion of the Lord Chief Justice, that had the insurance been effected by the defendant as agent that would not entitle the Court to draw the inference that the defendant's liability was to be limited. Even if the insurance had been effected on behalf of the plaintiff, it would give him an additional protection in case of loss, but he would not thereby lose his right to go against the defendant, and would be at liberty to sue either the defendant or the insurers. From either point of view the judgment appealed from was right, and must be supported.

LOPES and KAY L.JJ. concurred.

Appeal dismissed.

Solicitors for plaintiff: *Flower, Nussey & Fellowes, for Killick, Hutton & Vint, Bradford.*

Solicitors for defendant: *Hollams, Son, Coward & Hawksley.*

A. M.

END OF VOL. II.